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Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID P. CERVONE

Petitioner,

v.

CHARLES L. BORIS

Respondent,

On Petition For Writ Of Certiorari
To The Mahoning County Court of Appeals
Ohio Seventh Appellate District

PETITION FOR WRIT OF CERTIORARI

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59pp

QUESTIONS PRESENTED

This case puts at issue whether the summary judgment procedure is being properly utilized by Ohio courts to expedite the disposition of meritless claims, or whether it is being used as a tool to selectively deny certain litigants and claims their rightful day in court.

I. Whether petitioner was denied due process of law under the Fourteenth Amendment to the Constitution of the United States, by an appellate rule which prevents the Ohio Supreme Court, in its consideration of whether to allow an appeal, from reviewing the record of a case.

II. Whether petitioner was denied due process of law under the Fourteenth Amendment to the Constitution of the United States, by the Ohio Supreme Court's failure to review a case where the facts indicating summary judgment was inappropriate, and the errors of the Appellate court, were not disputed.

III. Whether petitioner was improperly denied his right to a trial and due process under the Seventh and Fourteenth Amendments to the Constitution of the United States by an improperly granted summary judgment.

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OPINIONS BELOW

The August 27, 1999 judgment and opinion of the Ohio Seventh District Court of Appeals affirming the dismissal of petitioner's complaint, *Cervone v Boris*, 1999 Ohio App. LEXIS 4119, Mahoning App. No. 96 CA 191, unreported, is reproduced in Appendix A. The September 18, 1996 judgment of the Mahoning County Common Pleas Court granting respondent's motion for summary judgment is not published and is reproduced in Appendix B. The Ohio Supreme Court's December 22, 1999 dismissal of petitioner's appeal, *Cervone v. Boris,* 721 N.E.2d 121, is reproduced in Appendix C, and the Ohio Supreme Court's February 2, 2000 denial of petitioner's motion for reconsideration is reproduced in Appendix D.

STATEMENT OF JURISDICTION

Judgment of the Ohio Supreme Court was entered on December 22, 1999, and reconsideration denied on February 2, 2000. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves matters of due process as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the right to trial as guaranteed by the Seventh Amendment to the Constitution of the United States as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserver, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

At issue are provisions of Oh S. Ct. Prac. R. III(1)(D) which is reproduced in Appendix E.

STATEMENT OF THE CASE

A. Factual Background

Petitioner and Linda Matteucci divorced in 1983 and agreed that petitioner would be the residential parent of their four-year-old child, Charles Cervone. In July of 1991, Mrs. Matteucci filed a motion for change of custody. Thereafter petitioner spoke to a psychologist about certain problems that he was having with Charles. The psychologist recommended evaluation and counseling for Charles, and for both natural parents and their spouses. At petitioner's urging, all parties eventually agreed to the recommendation and jointly agreed to utilize the services of Dr. William Price, owner of Specialty Care Psychiatric Services, Inc.

On March 13, 1992, at Dr. Price's request, petitioner's attorney John Schultz and Mrs. Matteucci's attorney Matthew Giannini, wrote a joint letter to Dr. Price specifying that he was to test and counsel with all the parties and requesting that, at the end of said testing and counseling, he advise both attorneys, by letter, if he had any opinion regarding what type of custody arrangement might be in the best interest of the child.

After Dr. Price completed the requested testing and counseling, he referred all the parties to respondent, an independent licensed social worker operating his practice out of the offices of Specialty Care, for ongoing therapy. At the time of the referral, Dr. Price showed respondent, the letter that had been sent to him by the attorneys. Over the course of the next several months, all the parties had numerous therapy sessions with respondent. Most, if not all, of petitioner's sessions were joint sessions in which his current wife participated. In June 1991, respondent moved his practice out of the

offices of Specialty Care, and all the parties continued their therapy sessions with respondent at his new location.

On August 5, 1992, petitioner filed a motion with the Domestic Relations Court to suspend a scheduled in-camera interview with Charles on the basis that it might not be in the child's best interest to be interviewed at that time. The next day respondent, without petitioner's knowledge or permission, sent a letter directly to the presiding judge, in which he urged the court to proceed with the interview and opined that the child was competent to make his own decisions. Additionally, he expressed an opinion that an adversarial relationship existed between petitioner and his ex-wife and that this relationship was influencing *each parent's* perception of the needs of the child.

Several days later, petitioner took his son to respondent's office for a scheduled therapy session, and was informed by respondent that he had sent a letter directly to the court regarding the custody of the child. Upon learning of respondent's actions, a heated argument broke out which culminated in petitioner removing his son from respondent's care.

A hearing on the custody matter was subsequently held on February 2, 1993, at which Mrs. Matteucci called respondent to testify as an expert witness. Petitioner asserted social worker-client privilege for himself, and waived, as the minor child's custodial parent, privilege with respect to Charles. In his testimony before the magistrate, respondent expressed the opinion that the communication system between petitioner and his ex-wife lacked quality, and that *the parties* had not yet resolved issues from their divorce.

B. Proceedings in the Courts Below

Petitioner's first amended complaint which is at the core of this petition is a refiled action (initially 92-CV-316) filed August 28, 1995, and reproduced in Appendix F. The complaint asserted four claims for relief against respondent: (1) breach of confidentiality and fiduciary duty; (2) breach of contract; (3) misrepresentation; and (4) intentional infliction of emotional distress. The parties agreed that all discovery taken in the first case would apply to the refiled case. The trial court granted summary judgment for respondent in September 1996, see Appendix B, and petitioner timely appealed to the Seventh District Court of Appeals.

The court of appeals affirmed the judgment of the trial court on August 27, 1999, see Appendix A, and petitioner timely filed a Notice of Appeal, and Memorandum in Support of Jurisdiction with the Ohio Supreme Court. In his Memorandum, petitioner argued that he was being denied his right to a trial under the Fourteenth Amendment by an improperly granted summary judgment.

On December 22, 1999, the Ohio Supreme Court dismissed the appeal, see Appendix C, and petitioner timely filed a motion for reconsideration wherein he argued that his Fourteenth Amendment due process rights were being further violated by the court's refusal to review the lower court's decision. The Ohio Supreme Court subsequently denied petitioner's Motion for Reconsideration on February 02, 2000, see Appendix D.

C. Facts Material to this Petition

Following are the facts material to this petition and to petitioner's claims against respondent:

1. Dr Price was not consulted in anticipation of being an expert witness in any litigation (App.G–29, par.10). The letter written by the attorneys to Dr. Price was intended to apply only to Dr. Price (App. I–33, par.2).

2. In March, 1991 Dr. Price referred all the parties to respondent for the purpose of receiving ongoing therapy and counseling (App. G–27, par.3; H–31, par.2). Respondent was, at the time, a self–employed licensed independent social worker operating his practice out of the offices of Specialty Care Psychiatric Services Inc. At no time relevant to this action was respondent an employee of either Dr. Price or Specialty Care (Boris depo. pp.14-18).

3. Respondent was never given a copy of the letter written to Dr. Price by the attorneys, nor did he ever have a copy of the letter in his possession prior to the initiation of this action (Boris depo. p.88)

4. Respondent assured petitioner that a social worker-client relationship existed between them (App. G–28, par.4; H–32, par.3), and such was petitioner's understanding at all times relevant to this action (Cervone depo. p.40). Respondent also assured petitioner that their relationship was confidential, and that no unauthorized disclosures would be made to anyone, under any circumstances (Boris depo. pp.57-59; App. G–28, par.4; App. H–32, par.3). Additionally, respondent agreed that any opinion contemplated under the letter sent by the attorneys, to Dr. Price, would be, as stated in the letter, the sole responsibility of Dr. Price (App.G–27,par.3; App. H–31,

par.2).

5. The opinion expressed by respondent in his August 6, 1991 letter to Domestic Relations Court that an adversarial relationship existed between petitioner and his ex-wife, and that this relationship had influenced "each parents perception of the needs of the child", was based, *in part,* on confidential information provided by petitioner (Boris depo. pp.70-71)

6. The opinions expressed by respondent in his February 1992, testimony before the Domestic Relations Court, that the communication system between petitioner and his ex–wife lacked quality and that issues from their divorce had not been resolved, was based, *in part*, on confidential information provided by petitioner (Boris depo. pp.85-86)

7. Neither petitioner or his legal representatives ever gave express consent, or otherwise authorized, requested, or directed respondent, to write any letter to the court, or to disclose any opinions regarding any matter, to anyone, irrespective of whether such opinions were based, *in any part*, on confidential information provided by appellant (App. .G–28, par.6,7; App. I.34, par.4; App. I–35, par.3).

8. As a direct result of the unauthorized letter respondent sent to the court, petitioner incurred additional legal expenses, and was subjected to severe emotion distress, humiliation and depression which required medical treatment and resultant medical expenses (App. G–29, par.8,11; App. J–36, par.4).

REASONS FOR GRANTING THE WRIT

SUMMARY

"The Seventh Amendment right to a jury trial is among our most precious rights, and although other equally important rights exist, none is a more important safeguard of our democratic system of justice". *See* Gregory A. Gordillo, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard,* 42 Clev St. L. Rev. 263, (1994), note199. Ohio courts have held that an improperly granted motion for summary judgement denies a litigant his right to trial under the Fourteenth Amendment, *Tschantz v. Ferguson*, 647 N. E.2d 507, (1994); and that a properly granted motion for summary judgment does not. *Houk v. Ross*, 296 N.E.2d 266. (1973). Accordingly, the real issue in this appeal has little to do with the core dispute between a social worker and his patient. Instead, this case has evolved into a legal precedent that threatens the Constitutional rights of *all* litigants–in Ohio–and elsewhere.

In affirming the trial court's dismissal of petitioner's claims on a motion for summary judgement, the Ohio Seventh District Appellate Court was so clearly in error, and so grossly ignored and/or perverted the rules governing summary judgment, as to make a mockery of the process. And the Ohio Supreme Court's failure to review the matter has only exacerbated the situation by pushing the matter into this Honorable Court. Instead of providing a means "to secure the just, speedy and inexpensive determination of every action," Fed. R. Civ. P. 1; *Celotex Corp. v. Catrett*, 477 U.S. 317, (1986), *this* summary judgment has consumed significantly more legal, judicial, and financial resources, than would ever have been expended by a simple trial on the merits.

Worse, this case sends a dangerous message to lower courts that they can, either intentionally or unintentionally, trample litigants' rights without fear of review or reprimand. This Court needs to demonstrate to the lower courts, and to the public, that it will not tolerate the types of abuses that took place in this case. By taking such action, this court will reduce the likelihood that future litigants will be faced with the unfair choice of subjecting themselves, as petitioner has, to a costly, time consuming, legal gauntlet, or simply walking away from valid claims because the cost of defending their rights is just too high. This situation desperately requires this Court's judicial supervision to avoid the risk of damaging the integrity of the judicial system.

ARGUMENT

I. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BY AN APPELLATE RULE WHICH PREVENTS THE OHIO SUPREME COURT, IN ITS CONSIDERATION OF WHETHER TO ALLOW AN APPEAL, FROM REVIEWING THE RECORD OF A CASE.

The availability of summary judgment is determined by whether the *evidence* presents sufficient disagreement to require a trial on the merits, or whether the evidence is so one sided that one party is entitled to prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, (1986). To avoid summary judgment, there must exist genuine issues of material fact that properly can be resolved only by a finder of fact. *Id.*

This Court has stated that a court considering a summary judgment motion must look at the *record* in the light most favorable to the party opposing the motion, *Poller v. Columbia Broadcasting System Inc.,* 368 U.S. 464, (1962), and that the *evidence* is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U. S. 451, (1992); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, (1970). Accordingly, any meaningful appellate review of a summary judgment must, by necessity, look to the *evidence and the record* in a case, and any rule that prevents an appellate court from engaging in such a process, denies a litigant attempting to correct an erroneous summary judgment, his right to due process, and a fair and impartial hearing. Oh. S. Ct. Prac. R. III (1)(D) (Appendix. E) is such a rule. It states, in relevant part:

> Section 1. Memorandum in Support of Jurisdiction.
>
> (A) In a claimed right of appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal. ***
>
> ***
>
> (D) A copy of the court of appeals opinion and judgment entry being appealed shall be attached to the memorandum. The Appellant may attach any other judgments entries or opinions issued in the case, if relevant to the appeal, and copies of unreported opinions cited in the memorandum. *The memorandum shall not include any other attachments.*
> (Emphasis added)

In contrast, this Court's S. Ct. Rule 14.1(i)(vi) allows a petitioner seeking certiorari, to include in an appendix:

> (vi) *any other material the petitioner believes essential to understand the petition.* (Emphasis added)

This seemingly small difference between the state and federal rules becomes significant when reviewing a case involving summary judgment, as in the case at bar. Under the Ohio rule, erroneous decisions by an Ohio Appellate Court concerning summary judgments are, for all intent and purpose, "bullet–proof", because the Ohio Supreme Court, in considering whether to hear the appeal, will never see any of the disputed *evidence* or *record* on which the decision is based. As amply demonstrated in this case, "[a]lthough avenues for attacking a wrongfully obtained summary judgment exist, they are frequently costly and cumbersome for the party who did nothing wrong". *See* Jeffery W. Stemple, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J., 95, 173, (1988).

As a practical matter, as long as an Ohio Court of Appeals properly states, in it's opinion, that "there are no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law", judicial review by the Ohio Supreme Court is *highly unlikely,* irrespective of how egregiously a lower court might have abused its discretion. And, if State Supreme Court review is *unlikely*, then the granting of certiorari by this Court, to review such matters, is a *virtual impossibility*. Confident, therefore, that there is no judicial supervision in sight, Ohio's Appellate Courts are free to pick and choose which litigants and claims receive their day in court, and there is little a litigant can do about it. This

Court should find such a situation unacceptable.

II. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BY THE OHIO SUPREME COURT'S FAILURE TO REVIEW A CASE WHERE THE FACTS INDICATING SUMMARY JUDGMENT WAS INAPPROPRIATE, AND THE ERRORS OF THE APPELLATE COURT, WERE NOT DISPUTED.

Oh. S. Ct. Prac. R III (1)(B)(3) states that, on appeal, a Memorandum in Support of Jurisdiction shall contain a statement of the case and facts, and Oh. S. Ct. Prac. R. III 2(A) allows an appellee to file a Memorandum in Response. Accordingly, petitioner, in his Memorandum, put before the Ohio Supreme Court, specific material facts, all supported *by reference* to the evidence in the record, which showed genuine issues for trial with respect to each of his four claims. Petitioner asserted that the court of appeals had ignored these facts, and had instead based its decision to affirm summary judgment, on facts which were either directly controverted by the evidence, or which were totally unsupported by the evidence. He also asserted that the court of appeals had failed to properly address the true nature of each of his claims.

Although respondent was entitled to submit a Memorandum in Response, wherein he could have disputed any of petitioner's facts or assertions, no memorandum was submitted, deftly avoiding supporting petitioner by *agreeing* with his facts and assertions, or supporting petitioner by *disagreeing* with his facts and assertions, thus establishing the existence of disputed material facts which would have precluded summary judgment. Respondent should not be allowed to

benefit from his failure to state a position based on whatever he believes to be the true facts and circumstances of this case.

In fact, faced with the absence of a merit brief in *State v. R&D Chemical Co.*, 648 N.E.2d 821, (1995), the Ohio Supreme Court previously held:

> "*** Appellee filed a memorandum in response to appellants' memorandum in support of jurisdiction. Appellee, however, failed to file its merit brief within the time allowed by the Rules of Practice of this court. Appellee attempted to file its brief beyond the thirty-day period set forth in S.Ct.Prac.R. VI(2) and, as such, appellee's brief was properly rejected by the Clerk. Accordingly, we also denied appellee's request for leave to participate in oral argument. Hence, given appellee's omission in this court, we are tempted to borrow from App.R. 18(C) and find that the facts, issues and assertions properly set forth in appellants' brief, when accepted as correct, reasonably appear to sustain a reversal of the judgment of the court of appeals.
>
> However, rather than attempt to assess which party is more at fault or which party has committed the more egregious omission, we believe, given the important issues involved in this case and the fact that a trial transcript is indeed available, that this case should be decided on the merits. This court has long recognized the fundamental tenet of judicial review in Ohio that courts should decide cases on the merits. *Hawkins v. Marion Correctional Inst.* (1986), 28 Ohio St.3d 4, 501 N.E.2d 1195. "Fairness and justice are best

served when a court disposes of a case on the merits." *DeHart v. Aetna Lift Ins. Co.* (1982), 69 Ohio St.2d 189, 213, 431 N.E.2d 644, 647."

Since the Ohio Supreme Court, in the absence of a response from respondent, did not see fit to apply the same standard and reasoning in this case, one is left to conclude that "fairness and justice" are only considerations when there are "[more] important" issues involved than are present in this case. Petitioner argues that this uneven application of judicial procedure is a violation of his right to due process under the Fourteenth Amendment, and that the Ohio Supreme Court erred, at least, by not allowing petitioner's appeal, and more properly should have reversed and remanded the matter back for trial, in the absence of opposition from respondent.

III. WHETHER PETITIONER WAS IMPROPERLY DENIED HIS RIGHT TO A TRIAL AND DUE PROCESS UNDER THE SEVENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY AN IMPROPERLY GRANTED SUMMARY JUDGMENT.

This court has stated that the purpose of summary judgment is not to cut litigants off from their right of trial by jury, if they really have issues to try, *Sartor v Arkansas Natural Gas Corp.*, 321 U.S. 620, (1944).

In this case, petitioner did everything that was required of him to properly oppose respondents motion for summary judgment. By specific reference to evidence in the record in the form of depositions, affidavits and other authenticated exhibits, petitioner provided evidence going to all issues on which he would have had the burden of production at trial on each of his stated causes of action.

Petitioner's first claim (App. F–22) alleged that respondent twice breached his duty of confidentiality, first in his letter to the Domestic Relations Court, and second in his sworn testimony before the court, by disclosing *opinions* which were based, at least in part, on confidential information provided by petitioner. Ohio courts recognize the existence of an independent tort for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship. *Biddle et al. v. Warren General Hospital et al.*, 86 Ohio St.3d 395, (1999).

Additionally, opinions, based on what is learned and observed within a confidential relationship, are themselves protected from unauthorized disclosure. *Moore v Grandview Hospital*, 25 Ohio St.3d 194, (1986); *Strizak v. Industrial Commission,* 159 Ohio St. 475, (1953). For this protection to be of any avail, it is axiomatic that the protection must be absolute. An opinion, to fall outside the sphere of protection, must be totally devoid of what is learned and observed within the confidential relationship, and conversely, an opinion based, in any infinitesimal part, on what is learned and observed within a protected confidential relationship, must, itself become a part of the protected relationship.

Since the Ohio General Assembly has chosen to protect the confidentiality of social worker-client relationships in a similar fashion through Oh. R.C. 2317.02 (G)(1), Oh. R.C. 4757.01, et seq, and the Oh. Admin. Code Chapter 4757, it follows that an independent tort must also exist for the unauthorized, unprivileged disclosure to a third party of non public information, including opinions, that a social worker has learned within the social worker-client relationship. Restated, absent express consent, the opinions of a social worker if based, in any part, on information learned within

the social worker-client relationship are protected, in Ohio, from unauthorized disclosure.

Oh. R. Civ. P. 8(A) specifically authorizes pleading and prosecuting "*** relief in the alternative or of several different types". Furthermore, Oh. R. Civ. P. 8(E)(2) provides that: "A Party may also state as many separate claims *** as he has regardless of consistency and whether based on legal or equitable grounds". Petitioner's second, third, and fourth claims of his First Amended Complaint are permitted under these rules, stating alternative grounds for recovery of damages against respondent under the facts and evidence in this case. It is important to note that these three claims have nothing to do with respondent's sworn testimony before the Domestic Relations Court, nor do they have anything to do with the disclosure of confidential information.

Petitioner's second claim (App. F–23) is a simple breach of contract claim wherein petitioner alleged that an [oral] agreement existed between the parties that called for respondent to provide therapy and counseling to petitioner for a fee, and which expressly contemplated that respondent would not be responsible for the formulation of any opinions, as that responsibility had been delegated to someone other than respondent. This claim is fully supported by the *uncontroverted* facts in Section C–Statement of the Case above.

Petitioner's third claim (App. F–24) for misrepresentation is based on respondent's deposition testimony (Boris depo. pp.47-48) that petitioner was never a client or patient. If that was true, then respondent's admitted assurances that any information divulged by petitioner was privileged and confidential could not have been true, and was made falsely with the intent to mislead petitioner. Additionally, respondents representations that Dr. Price would be responsible for

any opinions regarding the custody of the minor child was made falsely with the intent to mislead, as respondent subsequently offered his own opinions to the court while under no obligation to do so These representations induced reliance in petitioner, to his detriment, all as fully supported by the *uncontroverted* facts in Section C–Statement of the Case above.

Petitioner's fourth claim (App. F–25) for intentional infliction of emotional distress is based on the proposition that the unauthorized act of a social worker attempting to influence the outcome of litigation in manner adverse to the known wishes and desires of a client, or someone who believes they are a client, could easily be considered outrageous or beyond the bounds of decency by reasonable minds. Furthermore, in light of petitioner's documented medical treatment and respondents own testimony chronicling a "heated argument" with petitioner precipitated by the letter sent to the court (Boris depo. p.79), reasonable minds could conclude that petitioner suffered "severe" or "extreme" emotional distress, all as fully supported by the *uncontroverted* facts in Section C– Statement of the Case above.

For the reasons discussed above, summary judgment was not appropriate with respect to any of petitioner's claims.

CONCLUSION

This court has before it, within the four corners of this petition, ample evidence from the record of this case, to demonstrate that respondent simply was not entitled to summary judgment, and that the rules governing the operation of the Ohio Supreme Court, and the lack of judicial supervision in this case, have all had the effect of denying petitioner his rights to due process, and a trial, under the Seventh and Fourteenth Amendments.

In the event that respondent fails to file a brief in opposition to this petition, this Court should, pursuant to S. Ct. R. 15.2, view *this petition* as an accurate representation of the facts and law bearing on the issues herein presented, including the core assertion that the Court of Appeals erroneously affirmed summary judgment against petitioner, and improperly denied him his right to a trial on the merits.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Appendix A – Opinion And Order Of The Ohio Seventh District Court Of Appeals

CASE NO. 96 CA 191

STATE OF OHIO, MAHONING COUNTY,
IN THE COURT OF APPEALS
SEVENTH DISTRICT

1999 Ohio App. LEXIS 4119

DAVID P. CERVONE,
Plaintiff-Appellant

v.

CHARLES L. BORIS,
Defendant-Appellee

August 27, 1999, Decided
August 27, 1999, Filed

Civil Appeal from Mahoning County Common Pleas Court,
Case No. 95 CV 1541.

JUDGMENT: Affirmed.

JUDGES:
Hon. Joseph J. Vukovich,
Hon. Edward A. Cox,
Hon. Gene Donofrio.

VUKOVICH, J.

Plaintiff-appellant David Cervone appeals from the decision of the Mahoning County Common Pleas Court which granted summary judgment in favor of defendant-appellee Charles Boris. For the following reasons, the trial court's judgment is affirmed.

Appellant and Linda Matteucci divorced in 1983 and agreed that appellant would be the residential parent of their four year old child, Charles Cervone. However, Mrs. Matteucci filed a motion for a change of custody in 1991, after Charles expressed a desire to live with her. Thereafter, appellant spoke to a social worker about certain problems that he perceived Charles was having. This social worker recommended testing and counseling for Charles, his parents and their spouses. All parties eventually agreed to the recommendation and chose a psychiatrist, Dr. William Price, at Specialty Care Psychiatric Services, Inc. to test and counsel them.

At Dr. Price's suggestion, the attorneys of appellant and Mrs. Matteucci wrote a joint letter to Dr. Price in March 1992. This letter outlined the scope of services to be provided as follows:

> "Please be advised that we are writing to you on behalf of each of our respective clients, David Cervone AND Linda Matteucci relevant to the psychological testing which is to be completed by your office. At the present time, the parties are attempting to determine the best interest of the minor child, Charles Cervone, as to the designation of the residential parent. As a result, we are requesting that testing and counseling be done with the minor child, the parents of the minor

> child, and the spouses of the parents of the minor child. At the conclusion of said testing and counseling, we are requesting that a letter be issued to each of our offices indicating, if possible, which residence the child should reside at or in the alternative whether joint parenting would be in the best interest of the child."

After the requested testing was performed, Dr. Price informed appellant that the participants did not require his services as a psychiatrist. He referred the participants to appellee, a licensed independent social worker who counseled clients at Specialty Care. Dr. Price showed the above letter to appellee. Appellee had several separate meetings with Charles, with appellant and his wife, and with Mrs. Matteucci and her husband. While meeting with appellant and his wife, appellee told them that he would not divulge any confidences that were shared during the meetings. In June 1992, appellee discontinued his employment at Specialty Care and began employment at First Medical Psychiatric Counseling Associates, Inc. Charles and his family continued seeing appellee at his new facility.

On August 6, 1992, appellee sent a letter to Judge Leskovyansky of the Domestic Relations Court and sent copies of the letter to the attorneys of appellant and Mrs. Matteucci, respectively. Appellee's letter provided:

> "The purpose of this letter is to advise those parties vitally concerned with the disposition of Charles Cervone's custody. Based on a number of variables including ongoing counseling with Charles, formal assessment and clinical interviews with both respective parents and a psychological evaluation administered by my colleague

> Jack T. Raver, M.Ed., Ohio Licensed Psychologist, it is my considered professional judgment that Charles be allowed to follow his wishes and reside with his natural mother, Mrs. Matteucci. He is, in my opinion, clearly competent to make such a decision.
>
> It is apparent that the adversarial nature of the parental relationship has influenced each parent's perception of the needs of the child. However, based on the relationship of the child with each of his parents, I strongly believe his decision to reside with his mother to be the more nurturing of the two and therefore more consistent with the needs of the child at this time. As in any case of this sort, no totally happy resolution can occur. Charles should be given an in Camera Interview and it is my hope that the child be protected from any emotional backlash which might result from that event."

When appellant discovered that appellee had sent a letter to the court, he argued with appellee and terminated his services. A hearing on the motion to change custody was held on February 2, 1993, at which Mrs. Matteucci called appellee to testify. Appellant asserted social worker-client privilege with regards to appellee's testimony. Hence, the court limited appellee's testimony to cover only what he had learned from Charles and Mrs. Matteucci. Thereafter, Mrs. Matteucci became the residential parent of Charles pursuant to an agreement signed by appellant and incorporated into a court order. Appellant immediately filed suit against appellee.[1]

---

[1] He attempted to add Mrs. Matteucci and her attorney as defendants but the court dismissed them as parties. Appellant appealed the dismissal to this court in case number 94-CA-96. We held that there

Appellant's amended complaint outlines four causes of action: breach of confidentiality and fiduciary duty, breach of contract, misrepresentation, and intentional infliction of emotional distress. In June 1996, appellee moved for summary judgment. The court granted summary judgment for appellee in September. This timely appeal followed.

Appellant sets forth two assignments of error, the first of which alleges:

> "THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT, TO THE PREJUDICE OF PLAINTIFF-APPELLANT."

The assignment of error is divided into four sub-assignments of error, one for each of the causes of actions alleged in the complaint. The first sub-assignment provides:

> "APPELLANT'S CLAIM FOR BREACH OF CONFIDENTIALITY AND FIDUCIARY DUTY IS PREMISED UPON COMMON LAW AND COGNIZABLE UNDER R.C. 2317.02."

Social workers are guided by codes of ethical practice. R.C. 4757.11 and 4757.36 (A) (10). A client's right to confidentiality shall be protected by the social worker. Ohio Adm. Code 4757-5-01. "Confidential information shall only be revealed to others when the clients * * * have given their informed consent * * *." *Id*

---

lacked a final appealable order. Appellant then voluntarily dismissed his complaint with prejudice In July 1995, appellant refiled his lawsuit against appellee

Appellant's cause of action for breach of confidentiality is based upon opinions expressed by appellee in his letter to the Domestic Relations Court and by way of his testimony in front of said court. Appellant's main argument is that a social worker's opinion which is based in part upon a collateral client's revelations is confidential even [*7] if the opinion does not divulge confidential information about the collateral client and could have been formulated on the basis, of the primary client's revelations alone.

The letter written by appellee to the court reveals that the primary client, Charles, desires to live with his mother. Appellee opined that Charles is competent to make this decision. There is no indication on the face of the letter that appellee revealed information that was communicated to him by appellant in confidence. Appellant admits that appellee has not divulged the contents of any statements made during their meetings. Nonetheless, appellant points to the deposition testimony of appellee which was taken in preparation for this lawsuit where appellee admitted that personal information revealed by appellant was a variable affecting the opinion set forth in appellee's letter. (Depo. 71).

However, appellee also stated that his knowledge was derived not solely from information revealed by appellant but also from sources independent of any such revelations. Charles was the reason appellee's assistance was sought. Appellee formulated an opinion on the best interests and the competence of Charles as requested by the parents of Charles. If appellant wanted to ensure that appellee could not give an opinion to the court which affected the custody of his son, then he should not have asked Charles, his ex-wife and her spouse to seek counseling from appellee in order to determine the best interests of Charles. Further, he should not have consented to the letter written to Dr. Price, who owned the

clinic for which appellee worked, asking for an opinion on which parent should be the residential parent.

The testimony given by appellee before a referee in the Domestic Relations Court was limited to exclude any opinions based upon discussions with appellant. Thus, appellee was only permitted to testify as to his opinions that were based upon discussions with Mrs. Matteucci and Charles. Appellant complains about the following excerpt in appellee's testimony:

> "Q. My question was, how would he [Charles] do in a shared parenting agreement?
>
> A. I don't think he would do very well at all. And my opinion is that I think the communication system lacks quality from the ex-spouses. You can't have shared parenting, quality shared parenting, if you haven't resolved the issue from the divorce.
>
> Q. Communication? We're talking about the mother and father?
>
> A.From the respective parents.
>
> Q. To each other?
>
> A. Yes." (Partial Tr. 34).

As support for his breach of confidentiality allegation, appellant points to the following portion of appellee's deposition testimony:

> "Q. Do you see your opinion there that you don't think the communication system was favorable between the ex-spouses?
>
> A.Correct.

Q. Okay. Isn't that opinion based at least in part on information that you obtained from Mr. Cervone?

A. The information was based in part on what Charlie shared with me throughout his sessions.

* * *

Q. Did David Cervone talk to you about the extent and nature of his communication with his former spouse?

A. He spoke of difficulties with his former spouse.

Q. Do you remember him even telling you that he just doesn't talk to her?

A. I don't remember that.

Q. But in any event, he did give you information regarding the communication difficulties between the spouses?

A. Yes.

Q. So this would be one example of an opinion that you stated in court that was based at least in part upon information that you got from David Cervone?

A. Correct." (Depo. 85-86).

Appellee admitted that his opinion about the communication between appellant and Mrs. Matteucci was based in part upon information given to him by appellant. However, this information was also given to him by Charles and may have been given to him from Mrs. Matteucci as well. The court instructed appellee that he was permitted to express opinions that were based upon information gained from Mrs.

Matteucci and Charles.

Pursuant to R.C. 2317.02(G) (1), a social worker shall not testify concerning a confidential communication received from a client or concerning the social worker's advice to the client. This statute does not disqualify a person's social worker as a witness; it merely disallows testimony concerning confidential communications. Also, a client can expressly consent to the testimony of a social worker, thereby waiving the privilege. R.C. 2317.02(G) (1) (b).

In the case *sub judice,* the social worker-client privilege was waived by Mrs. Matteucci and by Charles. Thus, as the court ruled, appellee was permitted to testify concerning the confidential communications received from Mrs. Matteucci and Charles and concerning his advice to them. Appellant cannot file suit against appellee for following court orders. If appellee had a problem with appellant's testimony because it contained opinions that could have been derived from both privileged and nonprivileged sources, then appellee should have objected to the referee's evidentiary ruling and utilized the appeal process. Instead, appellant consented to the order appointing Mrs. Matteucci as the residential parent. For all of the above reasons, this sub-assignment of error is overruled.

Appellant's second sub-assignment contends:

> "APPELLEE OWED APPELLANT A DUTY TO NOT MAKE PUBLIC ANY OPINIONS BY AGREEMENT, AND THE EVIDENCE SUPPORTS APPELLEE'S BREACH OF SAME TO APPELLANT'S DAMAGE."

Appellee promised appellant that he would keep all revelations confidential. Appellant complains, that appellee reached his contractual duty to keep certain confidences.

However, under our above analysis, this argument fails.

Appellant also argues that, at a March 27, 1991 meeting, appellee agreed that any opinion letter about the custody of Charles would be written by Dr. Price. Appellant states that on May 29, 1991, appellee reiterated this understanding by stating that even though he was terminating his association with Dr. Price's clinic and appellant was following appellee to a new clinic, Dr. Price would remain responsible for the opinion letter. In support, appellant submits the affidavits of himself and of his wife who was present at both meetings.

The fact that Dr. Price did not formulate an opinion letter is not the fault of appellee. Additionally, we fail to see how appellee's letter regarding the best interests of Charles, the primary client, constituted breach of duty toward appellant. As aforementioned, appellant asked his ex-wife who had just filed a motion against him in the Domestic Relations Court to come to meetings to determine which parent should be the residential parent. Appellant participated in sending a letter to Dr. Price which asked that his "office" perform psychological testing and counseling and then formulate an opinion on the best interests of Charles. Dr. Price referred the participants to appellee who furnished the counseling and the letter. Appellee's primary client was Charles who desired to live with his mother. The letter served to further the wishes of appellee's primary client. As appellee argues, the cause of action in this case, if one so existed, would lie with Charles since the letter reveals his confidences. This sub-assignment is overruled.

Appellant's third sub-assignment of error provides:

"THE EVIDENCE DEMONSTRATES APPELLEE'S MATERIAL MISREPRESENTATIONS TO APPELLANT."

Appellant sets forth the elements of his third cause of action as follows: making a material representation with knowledge of its falsity or with utter disregard and recklessness as to its falsity, intending to mislead and causing justifiable reliance which results in injury. *Burr v. Board of Cty. Commrs. of Stark Cty.* (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101. Appellant claims that he need not establish fraudulent intent because the doctrine of constructive fraud applies in cases involving a fiduciary relationship. *Cohen v. Estate of Cohen* (1986), 23 Ohio St. 3d 90, 491 N.E.2d 698.

Appellant's brief complains that appellee divulged confidential matters after misrepresenting that all information disclosed by appellant would remain confidential. However, we have previously analyzed this allegation and determined that appellee did not disclose any confidential information received from appellant and that any opinions expressed by appellee were derived from information obtained from Charles and Mrs. Matteucci. Thus, there is no genuine issue of material fact as to the existence of a false representation. Appellee represented that he would not disclose confidences and he fulfilled that representation by not disclosing any confidences. Accordingly, this argument is overruled.

Appellant's fourth sub-assignment of error alleges:

> "GENUINE ISSUES OF MATERIAL FACT ALSO EXIST WITH REGARD TO APPELLANT'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS."

The elements for this cause of action are intentionally or recklessly causing severe emotional distress to another by extreme and outrageous conduct. *Yeager v Local Union 20* (1983), 6 Ohio St. 3d 369, 453 N.E.2d 666. Appellant asserts that whether his emotional distress was severe and whether appellee's conduct was extreme and outrageous are not proper questions to resolve on summary judgment. However, we have held that summary judgment is proper where the trial court determines as a matter of law that the defendant's conduct is not beyond all possible bounds of decency or that the plaintiff failed to allege serious and debilitating mental anguish. *Tarver v. Calex Corp.* (1998), 125 Ohio App. 3d 468, 708 N.E.2d 1041, 1998 WL 74378 *13. Since we held that no confidential information was disclosed by appellee, there exists no behavior which would constitute extreme and outrageous conduct. As such, this sub-assignment of error is overruled.

Appellant's second assignment of error alleges:

> "THE TRIAL COURT ERRED IN FAILING TO THOROUGHLY EXAMINE ALL OF PLAINTIFF-APPELLANT'S CLAIMS AND THE SUPPORTING MATERIALS SUBMITTED BY PLAINTIFF-APPELLANT, TO THE PREJUDICE OF PLAINTIFF-APPELLANT."

Appellant complains that the trial court's judgment entry does not discuss his claims for breach of contract,

misrepresentation, and intentional infliction of emotional distress. The judgment entry states that appellee did not disclose any privileged or confidential information either in his letter to the court or in his testimony in front of the referee. As can be seen from our prior discussion, all of appellant's causes of action revolve around the allegation that appellee divulged confidential information or expressed an opinion derived therefrom.

Appellant posits that summary judgment must be reversed pursuant to *Murphy v Reynoldsburg* (1992), 65 Ohio St. 3d 356, 604 N.E.2d 138, where the Court held that the trial court has a mandatory duty to examine the material submitted under Civ.R. 56(C). However, we fail to see the analogy between *Murphy* and the case *sub judice.* In *Murphy,* the trial court admitted that it did not read the motion for summary judgment, the opposition to summary judgment, or the attachments which included many depositions. *Id.* at 359. Because the court granted summary judgment based solely on oral argument, the Supreme Court of Ohio remanded the case to the trial court. *Id.* In the case at bar, there is no indication that the trial court failed to review all of the material submitted to it. In fact, the judgment entry begins, "From the affidavits, briefs, and other exhibits filed herein ***." Therefore, this assignment or error is without merit.

In conclusion, there exists no conflicting testimonials in this case. The issue was whether, under the facts and circumstances, appellee engaged in breach of confidence, breach of contract, fraud, or intentional infliction of emotional distress by disclosing an opinion held about the best interests of a child in a child custody case. Appellant sought counseling for his son for the purpose. of determining whether he or his ex-wife should be their son's residential parent. Appellant asked his ex-wife and her husband to meet with appellee for the

sake of their child. Appellant was a collateral client while his son was the primary client. By speaking for his primary client and revealing an opinion on his client's best interests, appellee did not disclose confidential information gained from his meetings with appellant. Thus, appellee was entitled to judgment as a matter of law.

For the foregoing reasons, the judgment of the trial court is affirmed.

Cox, P.J., concurs.
Donofrio, J., concurs.

APPROVED:
s/ Joseph J. Vukovich
JOSEPH J. VUKOVICH
Judge

Appendix B – Judgement Entry Of The Mahoning County Court Of Common Pleas

CASE NO. 95 CV 1541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS,

Defendant

Decided and Filed September 18, 1996

JUDGMENT ENTRY

JUDGE: CHARLES J. BANNON

From the affidavits, briefs and other exhibits filed herein, the Court finds that defendant Charles L. Boris did not disclose any privileged or confidential information either in his letter to Judge Leskovyansky concerning the custody issue, or in his before the Domestic Relations Referee.

Further, plaintiff David P. Cervone, in response to a question as to whether defendant Boris "divulged the statements or the content of the statements that you provided him," answered that defendant Boris has never to the best of his knowledge divulged such statements.

As to plaintiff's claim that defendant violated R.C. Section 4757.01, et seq. And the Ohio Administrative Code

Chapter 4757, there is no right of action for such violations even if a violation of the code of ethics was proven.

Defendant Boris' motion for summary judgment is sustained.

Complaint dismissed

s/ Charles J. Bannon
CHARLES J. BANNON
Judge Charles J. Bannon

Appendix C – Ohio Supreme Court Dismissal Entry

CASE NO. 99-1833

THE SUPREME COURT OF OHIO

87, Ohio St.3d 1475; 721 N.E.2d 121

DAVID P. CERVONE,

Appellant

v.

CHARLES L. BORIS,

Appellee

Decided an Filed December 22, 1999

On appeal from the Mahoning County Court of Appeals,
Seventh Appellate District

JUDGMENT ENTRY

THOMAS J. MOYER, Chief Justice

Upon consideration of the jurisdictional memorandum filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS: Docket Fee, $40.00, paid by David P. Cervone (Mahoning County Court of Appeals; No. 96CA191)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Appendix D – Ohio Supreme Court Denial of Motion for Reconsideration

CASE NO. 99-1833

THE SUPREME COURT OF OHIO

88, Ohio St.3d 1417; 723 N.E.2d 121

DAVID P. CERVONE,

Appellant

v.

CHARLES L. BORIS,

Appellee

Decided an Filed February 02, 2000

On appeal from the Mahoning County Court of Appeals, Seventh Appellate District

JUDGMENT ENTRY

THOMAS J. MOYER, Chief Justice

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 96CA191)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Appendix E – Ohio Supreme Court Rule III

RULE III. DETERMINATION OF JURISDICTION ON CLAIMED APPEALS OF RIGHT AND DISCRETIONARY APPEALS

Section 1. Memorandum in Support of Jurisdiction.

(A) In a claimed appeal of right or a discretionary appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal. See Form E following these rules for a sample memorandum.

(B) A memorandum in support of jurisdiction shall contain all of the following:

(1) Table of contents, which shall include the proposition(s) of law stated in syllabus form as set forth in *Drake v Bucher, Supt.* (1966), 5 Ohio St. 2d 37, at 39;

(2) A thorough explanation of why a substantial constitutional question is involved, why the case is of public or great general interest, or, in a felony case, why leave to appeal should be granted;

(3) A statement of the case and facts;

(4) Each proposition of law supported by a brief and concise argument.

(C) Except in post conviction death penalty cases, a memorandum shall not exceed 15 numbered pages, exclusive of the table of contents.

(D) A copy of the court of appeals opinion and judgment entry being appealed shall be attached to the memoran-

dum. The appellant may also attach any other judgment entries or opinions issued in the case, if relevant to the appeal, and copies of unreported opinions cited in the memorandum. The memorandum shall not include any other attachments.

(E) Except as otherwise provided in S. Ct. Prac. R. II, Section 2(A), if the appellant does not tender a memorandum in support of jurisdiction for timely filing along with the notice of appeal, the Clerk shall refuse to file the notice of appeal.

Section 2. Memorandum in Response

(A) Within 30 days after the Memorandum in support of jurisdiction is filed, the appellee may file a memorandum in response.

(Balance of rule omitted)

Appendix F – Petitioner's First Amended Complaint

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

FIRST AMENDED COMPLAINT

August 28, 1995, Filed

Before: CHARLES J. BANNON, Judge

I. PARTIES

1. Plaintiff, David P. Cervone, is and was at all times material hereto a resident of Youngstown, Mahoning County, Ohio.

2. At all times material hereto, defendant, Charles L. Boris, was a resident of Mahoning County, Ohio, and was a licensed social worker regularly transacting business within Mahoning County, Ohio.

II. CLAIM FOR RELIEF
COUNT ONE: BREACH OF CONFIDENTIALITY AND FIDUCIARY DUTY

3. In or about March of 1992, plaintiff established a fiduciary, social worker-client relationship with the defendant Boris, in Mahoning County, Ohio.

4. Under Ohio Revised Code §§4757.0l, et seq., Ohio Administrative Code Chapter *4757* and the code of ethics and standards promulgated by the National Association of Social Workers, all communications and other exchanges of information between plaintiff and defendant Boris, and opinions related thereto, were privileged and confidential.

5. During the period of approximately March 1992 through September of 1992, plaintiff disclosed privileged and confidential information to defendant Boris in the context of the parties' fiduciary, social worker-client relationship, for the limited purpose of obtaining counseling from the defendant regarding private matters involving plaintiff and his minor son.

6. At no time material hereto did plaintiff waive or relinquish the confidentiality attached to the information disclosed to defendant, nor did plaintiff authorize, permit or direct the defendant to divulge confidential information about the plaintiff, including opinions derived from that information, or the fact of the parties' relationship, to third persons.

7. On or about August 6, 1992, and again on or about February 2, 1993, the defendant Poris negligently, recklessly or intentionally disclosed privileged opinion information about the plaintiff to third persons, without authorization, permission or direction to do so.

8. This wrongful disclosure of privileged and confidential opinion information by the defendant was in violation of the laws, rules, standards and regulations governing defendant's practice as a licensed social worker and was in breach of the defendant's fiduciary duty to maintain the confidentiality and privilege of the information entrusted to him by plaintiff, and any opinions derived therefrom.

9. As a direct result and proximate result of the defendant's negligence, recklessness or intentional misconduct complained of herein, plaintiff has suffered severe emotional distress and embarrassment, and has necessarily incurred fees and expenses for medical care in the approximate sum of $1,000.00; $1,000.00 for incidental legal expenses; and paid defendant Boris approximately $500.00, all to his damage.

COUNT TWO: BREACH OF CONTRACT

10. Plaintiff realleges paragraphs I through 9 of his complaint as if fully rewritten herein.

11. In or about March of 1992, and again, in or about May of 1992, defendant Boris agreed that *any* opinions regarding plaintiff, or relating to the custody of plaintiff's minor son, would be the sole responsibility of Dr. William Price, as per an agreement between plaintiff and his ex-wife Linda Matteucci, and that defendant's function would be to provide counseling and therapy, as required, to plaintiff, plaintiff's wife, plaintiff's minor son, and plaintiff's ex-wife and her spouse.

12. The agreement between plaintiff and defendant contemplated and provided only that defendant would conduct certain interviews incident to his performance of said counseling and did not contemplate whatsoever that defen-

dant would publicize and divulge any opinions, to third persons.

13. Defendant Boris has materially breached the agreement entered into by and between plaintiff and defendant by wrongfully disclosing opinions regarding plaintiff and the custody of plaintiff's minor son, to third persons on or about August 6, 1992.

14. As a direct and proximate result of the defendant's breach, there has been a failure of consideration of services in the amount of money paid or owing to defendant in the approximate sum of $500.00, and plaintiff has incurred incidental and consequential medical and legal losses in the approximate sum of $2,000.00, to plaintiffs damage.

COUNT THREE: MISREPRESENTATION

14. Plaintiff realleges paragraph I through 13 of his complaint as if fully rewritten herein.

15. At all times material hereto, defendant Boris represented to plaintiff that a social worker-client relationship existed between the parties and that all information disclosed in the scope and context of the social worker-client relationship, would remain strictly privileged and confidential, and that any and all opinions contemplated under the agreement referred to in paragraph 11 above, would be the responsibility of Dr. William Price.

16. The aforementioned representation made by Boris was material to plaintiff and induced the plaintiffs reliance that he could freely, openly and thoroughly entrust private, personal and confidential information to the defendant.

17. Said representation knowingly made by defendant

Boris, was false and was intended to and did in fact induce reliance on the part of the plaintiff.

18. Plaintiff reasonably relied upon the defendant's representation to his detriment and injury inasmuch as defendant Boris thereafter negligently, recklessly or intentionally disclosed opinions about the plaintiff, and/or relating to custody matters involving plaintiff, to third persons without the authority, permission or direction to so.

19. As a direct and proximate result of the defendant's wrongful conduct complained of herein, plaintiff has suffered severe emotional distress and mental anguish, together with concomitant adverse physical health effects, humiliation, embarrassment and anxiety, and has necessarily incurred fees and expenses for medical care in the approximate sum of $1,000.00; incurred approximately $1,000.00 incidental legal expenses; and paid approximately $500.00 to defendant Boris, all to his damage.

COUNT FOUR: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

20. Plaintiff realleges paragraphs 1 through 19 of his complaint as if fully rewritten herein.

21. Defendant's wrongful disclosure and dissemination of opinions concerning the plaintiff was under circumstances and in a manner demonstrating defendant's intent or reckless disregard for the plaintiff's rights.

22. Defendant Boris either intended to cause or knew or should have known that his disclosure of opinions concerning plaintiff would result in psychic injury in the form of plaintiff's suffering of severe emotional distress.

23. As a direct and proximate result of the defendant's outrageous conduct complained of herein, the plaintiff has suffered severe emotional distress and anguish, together with concomitant adverse physical health effects, humiliation, depression, anxiety and embarrassment, and has necessarily incurred fees and expenses for medical care in the sum of $1,000.00; 1,000.00 incidental legal expenses; and paid approximately $500.00 to defendant Boris, all to his damage.

WHEREFORE, plaintiff. David P. Cervone, hereby demands judgment pursuant to his claims against defendant, Charles L. Boris, for the sum of Two Thousand Five Hundred Dollars ($2,500.00) special and consequential damages, and compensatory and punitive damages in excess of Twenty-Five Thousand Dollars *($25,000.00),* together with an order restraining and enjoining the defendant from further releasing, disclosing or disseminating any confidential information or opinions about plaintiff and directing and requiring defendant to deliver to plaintiff all original and copies of notes, memorandum and letters in his possession or control relating to the plaintiff, together with attorney's fees and costs in the within action.

Respectfully submitted,

s/ Gary J. Philibin
GARY J. PHILIBIN
Counsel for Plaintiff

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable in the within action.

s/ Gary J. Philibin

Appendix G – Affidavit of David P. Cervone

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, CHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

AFFIDAVIT OF DAVID P. CERVONE

Dated September 5, 1996

Before: CHARLES J. BANNON, Judge

David P. Cervone, after first being duly cautioned and sworn, upon personal knowledge and information deposes and states:

1. I am the Plaintiff in the above entitled action.

2. I was a patient of, and received therapy from, Charles L Boris, a Licensed Independent Social Worker, from March 27, 1991 until approximately August of 1991 as indicated in the partial billing records attached hereto as Exhibit A.

3. On March 27, 1991, Mr. Boris stated, in the presence of my wife Joyce, that we had been referred to him by Dr. William Price for the purpose of receiving therapy and

counseling. Mr. Boris further stated that he had reviewed the March 13, 1991 letter attached as Exhibit B, from Matthew C. Giannini and John F. Shultz to Dr. William Price, and that any future letter and/or opinions concerning the custody of my son Charles contemplated in said letter, would be the sole responsibility of Dr. Price.

4. On April 3, 1991, again in the presence of my wife Joyce, Mr. Boris confirmed, in response to a direct question from me, that a social-worker/client relationship existed between both Joyce and myself, and himself, and that any communications between us would be privileged and confidential and would not, and/or could not, be disclosed to anyone, under any circumstances.

5. On May 29,1991 Mr. Boris explained, again in the presence of my wife Joyce, that he was starting a new practice, and recommended that Joyce and I continue seeing him at his new location rather than starting over with a new therapist. Mr. Boris further stated that if we chose to continue counseling with him, Dr. Price would continue to be responsible for any letter and/or opinions referred to paragraph 3 above.

6. At no time did I ever, either directly or indirectly, authorize, request, or direct Mr. Boris to send any letter, to the Court of Domestic Relations, or any other entity or individual.

7. At no time did I ever, either directly or indirectly, express consent for Mr. Boris to make public, in any written or verbal form, any opinions based wholly, or in part, on any confidential information shared with him as part of the counseling referred to in paragraph 2 above.

8. The letter sent by Mr. Boris to the Court of Domestic Relations on August 6, 1991, was sent without my knowledge or consent, and resulted in additional legal fees being incurred in the matter of David P. Cervone vs. Elizabeth M. Cervone, nka Matteucci, (Case No. 82-DR-108 1), and medical expenses being incurred by myself, due to severe emotional distress, humiliation, and depression I sustained. The unauthorized opinions stated by the defendant effected my relationship with my son Charles, causing additional severe emotional distress.

9. With respect to the testing and counseling, which was the subject of Exhibit B attached, the suggestion that all parties (myself and my ex-wife, our son Charles, and our current spouses) be evaluated and participate in counseling, was first proposed by me in a meeting on October 9, 1991 between myself, my ex-wife, and our respective attorneys John Shultz and Matthew Giannini, and was based on the recommendation, made previously and later confirmed in Exhibit C, of Mary Stewart, a Licensed Psychologist. This proposal was finally agreed to by my ex-wife on February 22, 1992 (see Exhibits D& E attached).

10. Other than the agreement between myself and my ex-wife to participate in the testing and counseling referred to above, no agreement existed that bound either of us, in any manner, to any opinion which Dr. Price might have expressed as a result of the letter attached hereto as Exhibit B, or which contemplated Dr. Price being utilized as an expert witness in any litigation.

11. As a result of the defendant's actions, I sustained monetary damages in the approximate amount of $2,500.00 and was forced to seek professional counseling, and take medication, which I did not want to take, for depression and

disturbed sleep, conditions which periodically persist to this day.

Further affiant sayeth naugth

s/ David P. Cervone
DAVID P. CERVONE

Sworn to before me and subscribed in my presence this 5th day of September, 1996.

s/ Cynthia A. Byrne
CYNTHIA A. BYRNE
Notary Public

(Exhibits omitted)

Appendix H – Affidavit of Joyce G. Cervone

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

AFFIDAVIT OF JOYCE G. CERVONE

Dated September 4, 1996

Before: CHARLES J. BANNON, Judge

Joyce G. Cervone, after first being duly cautioned and sworn, upon personal knowledge and information deposes and states:

1. I am not a party in the above entitled action.

2. On March 27, 1991, Charles L. Boris, a Licensed Social Worker, stated in my presence, that my husband David and I had been referred to him by Dr. William Price for the purpose of receiving therapy and counseling. Mr. Boris further stated that he had reviewed the March 13, 1991 letter attached as Exhibit A, from Matthew C. Giannini and John F. Shultz to Dr. William Price, and that any future letter and/or

opinions concerning the custody of my stepson Charles contemplated in said letter, would be the sole responsibility of Dr. Price.

3. On April 3, 1991, again in the my presence, Mr. Boris confirmed, in response to a direct question from my husband, that a social-worker/client relationship existed between both David and myself, and himself, and that any communications between us would be privileged and confidential and would not, and/or could not, be disclosed to anyone, under any circumstances.

4. On May 29,1991, again in my presence, Mr. Boris explained that he was starting a new practice, and recommended that David and I continue seeing him at his new location rather than starting over with a new therapist. Mr. Boris further stated that if we chose to continue counseling with him, Dr. Price would continue to be responsible for any future letter and/or opinion referred to in paragraph 3 above.

Further affiant sayeth naught.

s/ Joyce G. Cervone
JOYCE G. CERVONE

Sworn to before me and subscribed in my presence this 4th day of September,

s/ Cynthia A. Byrne
CYNTHIA A. BYRNE
Notary Public

(Exhibits omitted)

Appendix I – Affidavit of Attorney John F. Shultz

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

AFFIDAVIT OF JOHN F. SHULTZ

Dated September 4, 1996

Before: CHARLES J. BANNON, Judge

John F. Shultz, after first being duly cautioned and sworn, upon personal knowledge and information deposes and states:

1. I am a licensed Attorney in the State of Ohio.

2. I was the legal representative of David P. Cervone in the matter of David P. Cervone vs. Elizabeth M. Cervone, nka Matteucci (Case No. 82- DR-108 1), from approximately June of 1991, to August 5, 1992.

3. The agreement between David P. Cervone and Elizabeth Matteucci to have their son Charles, themselves, and their spouses, evaluated and counseled, provided that Dr. William Price would be responsible for said evaluation,

counseling, and any letter expressing opinion directed to Matthew C. Giannini and myself, all as referred to in Exhibit A attached.

4. I never authorized, requested, or directed Charles L. Boris to send any letter, or express any opinion, anticipated under the aforementioned agreement, to either myself, the Court of Domestic Relations, or any other individual, or entity.

5. I have no recollection of any agreement between David Cervone and Linda Matteucci to be bound by, in any manner, any opinion expressed by Dr. Price, nor do I recall indicating, to any individual, that such an agreement existed.

Further affiant sayeth naught.

s/ John F. Shultz
JOHN F. SHULTZ

Sworn to before me and subscribed in my presence this 4th day of September, 1996

s/ Michele A. Salvino-Smith
MICHELE A. SALVINO-SMITH
Notary Public

(Exhibits omitted)

Appendix J – Affidavit of Martin S.Delahunty, III

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

AFFIDAVIT OF MARTIN S. DELAHUNTY, III

Dated September 3, 1996

Before: CHARLES J. BANNON, Judge

Martin S. Delahunty, Ill, after first being duly cautioned and sworn, upon personal knowledge and information deposes and states

1. I am a licensed Attorney in the State of Ohio.

2. I was the legal representative of David P. Cervone in the matter of David P. Cervone vs. Elizabeth M. Cervone, nka Matteucci (Case No. 82-DR-1081), from approximately July of 1992, to September of 1993.

3. I never authorized, requested, or directed Charles L. Boris to send any letter, or express any opinion, to either myself, the Court of Domestic Relations, or any other individual, or entity.

4. The letter dated August 6, 1992, which Mr. Boris sent to Judge John J. Leskovyansky, was the direct cause of additional legal fees being incurred by Mr. Cervone.

Further affliant sayeth naught.

s/ Martin S. Delahunty, III
MARTIN S. DELAHUNTY, III

Sworn to before me and subscribed in my presence this 3rd day of September, 1996

s/ Elaine G. Mosbrook
ELAINE G. MOSBROOK
Notary Public

(Exhibits omitted)

Supreme Court, U.S.
FILED
(2)
99 1764 MAY 2 - 2000
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

DAVID P. CERVONE
Petitioner,

v.

CHARLES L. BORIS
Respondent,

On Petition For Writ Of Certiorari
To The Mahoning County Court of Appeals
Ohio Seventh Appellate District

PETITION FOR WRIT OF CERTIORARI

David P. Cervone
Pro Se
211 Mill Creek Drive
Youngstown, Ohio 44512
(330) 783-1135

CORRECTED COPY

60PP

QUESTIONS PRESENTED

This case puts at issue whether the summary judgment procedure is being properly utilized by Ohio courts to expedite the disposition of meritless claims, or whether it is being used as a tool to selectively deny certain litigants and claims their rightful day in court.

I. Whether petitioner was denied due process of law under the Fourteenth Amendment to the Constitution of the United States, by an appellate rule which prevents the Ohio Supreme Court, in its consideration of whether to allow an appeal, from reviewing the record of a case.

II. Whether petitioner was denied due process of law under the Fourteenth Amendment to the Constitution of the United States, by the Ohio Supreme Court's failure to review a case where the facts indicating summary judgment was inappropriate, and the errors of the Appellate court, were not disputed.

III. Whether petitioner was improperly denied his right to a trial and due process under the Seventh and Fourteenth Amendments to the Constitution of the United States by an improperly granted summary judgment.

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Jeffery W. Stemple, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J., 95, 173, (1988) 11

OPINIONS BELOW

The August 27, 1999 judgment and opinion of the Ohio Seventh District Court of Appeals affirming the dismissal of petitioner's complaint, *Cervone v Boris*, 1999 Ohio App. LEXIS 4119, Mahoning App. No. 96 CA 191, unreported, is reproduced in Appendix A. The September 18, 1996 judgment of the Mahoning County Common Pleas Court granting respondent's motion for summary judgment is not published and is reproduced in Appendix B. The Ohio Supreme Court's December 22, 1999 dismissal of petitioner's appeal, *Cervone v. Boris,* 721 N.E.2d 121, is reproduced in Appendix C, and the Ohio Supreme Court's February 2, 2000 denial of petitioner's motion for reconsideration is reproduced in Appendix D.

STATEMENT OF JURISDICTION

Judgment of the Ohio Supreme Court was entered on December 22, 1999, and reconsideration denied on February 2, 2000. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves matters of due process as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the right to trial as guaranteed by the Seventh Amendment to the Constitution of the United States as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserver, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

At issue are provisions of Oh S. Ct. Prac. R. III(1)(D) which is reproduced in Appendix E.

STATEMENT OF THE CASE

A. Factual Background

Petitioner and Linda Matteucci divorced in 1983 and agreed that petitioner would be the residential parent of their four-year-old child, Charles Cervone. In July of 1991, Mrs. Matteucci filed a motion for change of custody. Thereafter petitioner spoke to a psychologist about certain problems that he was having with Charles. The psychologist recommended evaluation and counseling for Charles, and for both natural parents and their spouses. At petitioner's urging, all parties eventually agreed to the recommendation and jointly agreed to utilize the services of Dr. William Price, owner of Specialty Care Psychiatric Services, Inc.

On March 13, 1992, at Dr. Price's request, petitioner's attorney John Schultz and Mrs. Matteucci's attorney Matthew Giannini, wrote a joint letter to Dr. Price specifying that he was to test and counsel with all the parties and requesting that, at the end of said testing and counseling, he advise both attorneys, by letter, if he had any opinion regarding what type of custody arrangement might be in the best interest of the child.

After Dr. Price completed the requested testing and counseling, he referred all the parties to respondent, an independent licensed social worker operating his practice out of the offices of Specialty Care, for ongoing therapy. At the time of the referral, Dr. Price showed respondent, the letter that had been sent to him by the attorneys. Over the course of the next several months, all the parties had numerous therapy sessions with respondent. Most, if not all, of petitioner's sessions were joint sessions in which his current wife participated. In June 1991, respondent moved his practice out of the

offices of Specialty Care, and all the parties continued their therapy sessions with respondent at his new location.

On August 5, 1992, petitioner filed a motion with the Domestic Relations Court to suspend a scheduled in-camera interview with Charles on the basis that it might not be in the child's best interest to be interviewed at that time. The next day respondent, without petitioner's knowledge or permission, sent a letter directly to the presiding judge, in which he urged the court to proceed with the interview and opined that the child was competent to make his own decisions. Additionally, he expressed an opinion that an adversarial relationship existed between petitioner and his ex-wife and that this relationship was influencing *each parent's* perception of the needs of the child.

Several days later, petitioner took his son to respondent's office for a scheduled therapy session, and was informed by respondent that he had sent a letter directly to the court regarding the custody of the child. Upon learning of respondent's actions, a heated argument broke out which culminated in petitioner removing his son from respondent's care.

A hearing on the custody matter was subsequently held on February 2, 1993, at which Mrs. Matteucci called respondent to testify as an expert witness. Petitioner asserted social worker-client privilege for himself, and waived, as the minor child's custodial parent, privilege with respect to Charles. In his testimony before the magistrate, respondent expressed the opinion that the communication system between petitioner and his ex-wife lacked quality, and that *the parties* had not yet resolved issues from their divorce.

B. Proceedings in the Courts Below

Petitioner's first amended complaint which is at the core of this petition is a refiled action (initially 92-CV-316) filed August 28, 1995, and reproduced in Appendix F. The complaint asserted four claims for relief against respondent: (1) breach of confidentiality and fiduciary duty; (2) breach of contract; (3) misrepresentation; and (4) intentional infliction of emotional distress. The parties agreed that all discovery taken in the first case would apply to the refiled case. The trial court granted summary judgment for respondent in September 1996, see Appendix B, and petitioner timely appealed to the Seventh District Court of Appeals.

The court of appeals affirmed the judgment of the trial court on August 27, 1999, see Appendix A, and petitioner timely filed a Notice of Appeal, and Memorandum in Support of Jurisdiction with the Ohio Supreme Court. In his Memorandum, petitioner argued that he was being denied his right to a trial under the Fourteenth Amendment by an improperly granted summary judgment.

On December 22, 1999, the Ohio Supreme Court dismissed the appeal, see Appendix C, and petitioner timely filed a motion for reconsideration wherein he argued that his Fourteenth Amendment due process rights were being further violated by the court's refusal to review the lower court's decision. The Ohio Supreme Court subsequently denied petitioner's Motion for Reconsideration on February 02, 2000, see Appendix D.

C. Facts Material to this Petition

Following are the facts material to this petition and to petitioner's claims against respondent:

1. Dr Price was not consulted in anticipation of being an expert witness in any litigation (App.G–29, par.10). The letter written by the attorneys to Dr. Price was intended to apply only to Dr. Price (App. I–33, par.2).

2. In March, 1991 Dr. Price referred all the parties to respondent for the purpose of receiving ongoing therapy and counseling (App. G–27, par.3; H–31, par.2). Respondent was, at the time, a self–employed licensed independent social worker operating his practice out of the offices of Specialty Care Psychiatric Services Inc. At no time relevant to this action was respondent an employee of either Dr. Price or Specialty Care (Boris depo. pp.14-18).

3. Respondent was never given a copy of the letter written to Dr. Price by the attorneys, nor did he ever have a copy of the letter in his possession prior to the initiation of this action (Boris depo. p.88)

4. Respondent assured petitioner that a social worker-client relationship existed between them (App. G–28, par.4; H–32, par.3), and such was petitioner's understanding at all times relevant to this action (Cervone depo. p.40). Respondent also assured petitioner that their relationship was confidential, and that no unauthorized disclosures would be made to anyone, under any circumstances (Boris depo. pp.57-59; App. G–28, par.4; App. H–32, par.3). Additionally, respondent agreed that any opinion contemplated under the letter sent by the attorneys, to Dr. Price, would be, as stated in the letter, the sole responsibility of Dr. Price (App.G–27,par.3; App. H–31, par.2).

5. The opinion expressed by respondent in his August 6, 1991 letter to Domestic Relations Court that an adversarial relationship existed between petitioner and his ex-wife, and that this relationship had influenced "each parents perception of the needs of the child", was based, *in part,* on confidential information provided by petitioner (Boris depo. pp.70-71)

6. The opinions expressed by respondent in his February 1992, testimony before the Domestic Relations Court, that the communication system between petitioner and his ex–wife lacked quality and that issues from their divorce had not been resolved, was based, *in part*, on confidential information provided by petitioner (Boris depo. pp.85-86)

7. Neither petitioner or his legal representatives ever gave express consent, or otherwise authorized, requested, or directed respondent, to write any letter to the court, or to disclose any opinions regarding any matter, to anyone, irrespective of whether such opinions were based, *in any part*, on confidential information provided by appellant (App. .G–28, par.6,7; App. I.34, par.4; App. I–35, par.3).

8. As a direct result of the unauthorized letter respondent sent to the court, petitioner incurred additional legal expenses, and was subjected to severe emotion distress, humiliation and depression which required medical treatment and resultant medical expenses (App. G–29, par.8,11; App. J–36, par.4).

REASONS FOR GRANTING THE WRIT

SUMMARY

"The Seventh Amendment right to a jury trial is among our most precious rights, and although other equally important rights exist, none is a more important safeguard of our democratic system of justice". *See* Gregory A. Gordillo, *Summary Judgment and Problems in Applying the Celotex Trilogy Standard,* 42 Clev St. L. Rev. 263, (1994), note199. Ohio courts have held that an improperly granted motion for summary judgement denies a litigant his right to trial under the Fourteenth Amendment, *Tschantz v. Ferguson*, 647 N. E.2d 507, (1994); and that a properly granted motion for summary judgment does not. *Houk v. Ross*, 296 N.E.2d 266. (1973). Accordingly, the real issue in this appeal has little to do with the core dispute between a social worker and his patient. Instead, this case has evolved into a legal precedent that threatens the Constitutional rights of *all* litigants–in Ohio–and elsewhere.

In affirming the trial court's dismissal of petitioner's claims on a motion for summary judgement, the Ohio Seventh District Appellate Court was so clearly in error, and so grossly ignored and/or perverted the rules governing summary judgment, as to make a mockery of the process. And the Ohio Supreme Court's failure to review the matter has only exacerbated the situation by pushing the matter into this Honorable Court. Instead of providing a means "to secure the just, speedy and inexpensive determination of every action," Fed. R. Civ. P. 1; *Celotex Corp. v. Catrett*, 477 U.S. 317, (1986), *this* summary judgment has consumed significantly more legal, judicial, and financial resources, than would ever have been expended by a simple trial on the merits.

Worse, this case sends a dangerous message to lower courts that they can, either intentionally or unintentionally, trample litigants' rights without fear of review or reprimand. This Court needs to demonstrate to the lower courts, and to the public, that it will not tolerate the types of abuses that took place in this case. By taking such action, this court will reduce the likelihood that future litigants will be faced with the unfair choice of subjecting themselves, as petitioner has, to a costly, time consuming, legal gauntlet, or simply walking away from valid claims because the cost of defending their rights is just too high. This situation desperately requires this Court's judicial supervision to avoid the risk of damaging the integrity of the judicial system.

ARGUMENT

I. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BY AN APPELLATE RULE WHICH PREVENTS THE OHIO SUPREME COURT, IN ITS CONSIDERATION OF WHETHER TO ALLOW AN APPEAL, FROM REVIEWING THE RECORD OF A CASE.

The availability of summary judgment is determined by whether the *evidence* presents sufficient disagreement to require a trial on the merits, or whether the evidence is so one sided that one party is entitled to prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, (1986). To avoid summary judgment, there must exist genuine issues of material fact that properly can be resolved only by a finder of fact. *Id.*

This Court has stated that a court considering a summary judgment motion must look at the *record* in the light most favorable to the party opposing the motion, *Poller v. Columbia Broadcasting System Inc.,* 368 U.S. 464, (1962), and that the *evidence* is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U. S. 451, (1992); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, (1970). Accordingly, any meaningful appellate review of a summary judgment must, by necessity, look to the *evidence and the record* in a case, and any rule that prevents an appellate court from engaging in such a process, denies a litigant attempting to correct an erroneous summary judgment, his right to due process, and a fair and impartial hearing. Oh. S. Ct. Prac. R. III (1)(D) (Appendix. E) is such a rule. It states, in relevant part:

> Section 1. Memorandum in Support of Jurisdiction.
>
> (A) In a claimed right of appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal. ***
>
> ***
>
> (D) A copy of the court of appeals opinion and judgment entry being appealed shall be attached to the memorandum. The Appellant may attach any other judgments entries or opinions issued in the case, if relevant to the appeal, and copies of unreported opinions cited in the memorandum. *The memorandum shall not include any other attachments.*
> (Emphasis added)

In contrast, this Court's S. Ct. Rule 14.1(i)(vi) allows a petitioner seeking certiorari, to include in an appendix:

> (vi) *any other material the petitioner believes essential to understand the petition.* (Emphasis added)

This seemingly small difference between the state and federal rules becomes significant when reviewing a case involving summary judgment, as in the case at bar. Under the Ohio rule, erroneous decisions by an Ohio Appellate Court concerning summary judgments are, for all intent and purpose, "bullet–proof", because the Ohio Supreme Court, in considering whether to hear the appeal, will never see any of the disputed *evidence* or *record* on which the decision is based. As amply demonstrated in this case, "[a]lthough avenues for attacking a wrongfully obtained summary judgment exist, they are frequently costly and cumbersome for the party who did nothing wrong". *See* Jeffery W. Stemple, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J., 95, 173, (1988).

As a practical matter, as long as an Ohio Court of Appeals properly states, in it's opinion, that "there are no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law", judicial review by the Ohio Supreme Court is *highly unlikely,* irrespective of how egregiously a lower court might have abused its discretion. And, if State Supreme Court review is *unlikely*, then the granting of certiorari by this Court, to review such matters, is a *virtual impossibility*. Confident, therefore, that there is no judicial supervision in sight, Ohio's Appellate Courts are free to pick and choose which litigants and claims receive their day in court, and there is little a litigant can do about it. This Court should find such a situation unacceptable.

II. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BY THE OHIO SUPREME COURT'S FAILURE TO REVIEW A CASE WHERE THE FACTS INDICATING SUMMARY JUDGMENT WAS INAPPROPRIATE, AND THE ERRORS OF THE APPELLATE COURT, WERE NOT DISPUTED.

Oh. S. Ct. Prac. R III (1)(B)(3) states that, on appeal, a Memorandum in Support of Jurisdiction shall contain a statement of the case and facts, and Oh. S. Ct. Prac. R. III 2(A) allows an appellee to file a Memorandum in Response. Accordingly, petitioner, in his Memorandum, put before the Ohio Supreme Court, specific material facts, all supported *by reference* to the evidence in the record, which showed genuine issues for trial with respect to each of his four claims. Petitioner asserted that the court of appeals had ignored these facts, and had instead based its decision to affirm summary judgment, on facts which were either directly controverted by the evidence, or which were totally unsupported by the evidence. He also asserted that the court of appeals had failed to properly address the true nature of each of his claims.

Although respondent was entitled to submit a Memorandum in Response, wherein he could have disputed any of petitioner's facts or assertions, no memorandum was submitted, deftly avoiding supporting petitioner by *agreeing* with his facts and assertions, or supporting petitioner by *disagreeing* with his facts and assertions, thus establishing the existence of disputed material facts which would have precluded summary judgment. Respondent should not be allowed to benefit from his failure to state a position based on whatever he believes to be the true facts and circumstances of this case.

In fact, faced with the absence of a merit brief in *State v. R&D Chemical Co.*, 648 N.E.2d 821, (1995), the Ohio Supreme Court previously held:

> "*** Appellee filed a memorandum in response to appellants' memorandum in support of jurisdiction. Appellee, however, failed to file its merit brief within the time allowed by the Rules of Practice of this court. Appellee attempted to file its brief beyond the thirty-day period set forth in S.Ct.Prac.R. VI(2) and, as such, appellee's brief was properly rejected by the Clerk. Accordingly, we also denied appellee's request for leave to participate in oral argument. Hence, given appellee's omission in this court, we are tempted to borrow from App.R. 18(C) and find that the facts, issues and assertions properly set forth in appellants' brief, when accepted as correct, reasonably appear to sustain a reversal of the judgment of the court of appeals.
>
> However, rather than attempt to assess which party is more at fault or which party has committed the more egregious omission, we believe, given the important issues involved in this case and the fact that a trial transcript is indeed available, that this case should be decided on the merits. This court has long recognized the fundamental tenet of judicial review in Ohio that courts should decide cases on the merits. *Hawkins v. Marion Correctional Inst.* (1986), 28 Ohio St.3d 4, 501 N.E.2d 1195. "Fairness and justice are best served when a court disposes of a case on the merits." *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 213, 431 N.E.2d 644, 647."

Since the Ohio Supreme Court, in the absence of a response from respondent, did not see fit to apply the same standard and reasoning in this case, one is left to conclude that "fairness and justice" are only considerations when there are "[more] important" issues involved than are present in this case. Petitioner argues that this uneven application of judicial procedure is a violation of his right to due process under the Fourteenth Amendment, and that the Ohio Supreme Court erred, at least, by not allowing petitioner's appeal, and more properly should have reversed and remanded the matter back for trial, in the absence of opposition from respondent.

III. WHETHER PETITIONER WAS IMPROPERLY DENIED HIS RIGHT TO A TRIAL AND DUE PROCESS UNDER THE SEVENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY AN IMPROPERLY GRANTED SUMMARY JUDGMENT.

This court has stated that the purpose of summary judgment is not to cut litigants off from their right of trial by jury, if they really have issues to try, *Sartor v Arkansas Natural Gas Corp.,* 321 U.S. 620, (1944).

In this case, petitioner did everything that was required of him to properly oppose respondents motion for summary judgment. By specific reference to evidence in the record in the form of depositions, affidavits and other authenticated exhibits, petitioner provided evidence going to all issues on which he would have had the burden of production at trial on each of his stated causes of action.

Petitioner's first claim (App. F–22) alleged that respondent twice breached his duty of confidentiality, first in his letter to the Domestic Relations Court, and second in his

sworn testimony before the court, by disclosing *opinions* which were based, at least in part, on confidential information provided by petitioner. Ohio courts recognize the existence of an independent tort for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship. *Biddle et al. v. Warren General Hospital et al.*, 86 Ohio St.3d 395, (1999).

Additionally, opinions, based on what is learned and observed within a confidential relationship, are themselves protected from unauthorized disclosure. *Moore v Grandview Hospital*, 25 Ohio St.3d 194, (1986); *Strizak v. Industrial Commission,* 159 Ohio St. 475, (1953). For this protection to be of any avail, it is axiomatic that the protection must be absolute. An opinion, to fall outside the sphere of protection, must be totally devoid of what is learned and observed within the confidential relationship, and conversely, an opinion based, in any infinitesimal part, on what is learned and observed within a protected confidential relationship, must, itself become a part of the protected relationship.

Since the Ohio General Assembly has chosen to protect the confidentiality of social worker-client relationships in a similar fashion through Oh. R.C. 2317.02 (G)(1), Oh. R.C. 4757.01, et seq, and the Oh. Admin. Code Chapter 4757, it follows that an independent tort must also exist for the unauthorized, unprivileged disclosure to a third party of non public information, including opinions, that a social worker has learned within the social worker-client relationship. Restated, absent express consent, the opinions of a social worker if based, in any part, on information learned within the social worker-client relationship are protected, in Ohio, from unauthorized disclosure.

Oh. R. Civ. P. 8(A) specifically authorizes pleading and prosecuting "*** relief in the alternative or of several different types". Furthermore, Oh. R. Civ. P. 8(E)(2) provides that: "A Party may also state as many separate claims *** as he has regardless of consistency and whether based on legal or equitable grounds". Petitioner's second, third, and fourth claims of his First Amended Complaint are permitted under these rules, stating alternative grounds for recovery of damages against respondent under the facts and evidence in this case. It is important to note that these three claims have nothing to do with respondent's sworn testimony before the Domestic Relations Court, nor do they have anything to do with the disclosure of confidential information.

Petitioner's second claim (App. F–23) is a simple breach of contract claim wherein petitioner alleged that an [oral] agreement existed between the parties that called for respondent to provide therapy and counseling to petitioner for a fee, and which expressly contemplated that respondent would not be responsible for the formulation of any opinions, as that responsibility had been delegated to someone other than respondent. This claim is fully supported by the *uncontroverted* facts in Section C–Statement of the Case above.

Petitioner's third claim (App. F–24) for misrepresentation is based on respondent's deposition testimony (Boris depo. pp.47-48) that petitioner was never a client or patient. If that was true, then respondent's admitted assurances that any information divulged by petitioner was privileged and confidential could not have been true, and was made falsely with the intent to mislead petitioner. Additionally, respondents representations that Dr. Price would be responsible for any opinions regarding the custody of the minor child was made falsely with the intent to mislead, as respondent subsequently offered his own opinions to the court while under no

obligation to do so These representations induced reliance in petitioner, to his detriment, all as fully supported by the *uncontroverted* facts in Section C–Statement of the Case above.

Petitioner's fourth claim (App. F–25) for intentional infliction of emotional distress is based on the proposition that the unauthorized act of a social worker attempting to influence the outcome of litigation in manner adverse to the known wishes and desires of a client, or someone who believes they are a client, could easily be considered outrageous or beyond the bounds of decency by reasonable minds. Furthermore, in light of petitioner's documented medical treatment and respondents own testimony chronicling a "heated argument" with petitioner precipitated by the letter sent to the court (Boris depo. p.79), reasonable minds could conclude that petitioner suffered "severe" or "extreme" emotional distress, all as fully supported by the *uncontroverted* facts in Section C– Statement of the Case above.

For the reasons discussed above, summary judgment was not appropriate with respect to any of petitioner's claims.

CONCLUSION

This court has before it, within the four corners of this petition, ample evidence from the record of this case, to demonstrate that respondent simply was not entitled to summary judgment, and that the rules governing the operation of the Ohio Supreme Court, and the lack of judicial supervision in this case, have all had the effect of denying petitioner his rights to due process, and a trial, under the Seventh and Fourteenth Amendments.

In the event that respondent fails to file a brief in opposition to this petition, this Court should, pursuant to S. Ct. R. 15.2, view *this petition* as an accurate representation of the facts and law bearing on the issues herein presented, including the core assertion that the Court of Appeals erroneously affirmed summary judgment against petitioner, and improperly denied him his right to a trial on the merits.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

David P. Cervone
Pro Se
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Youngstown, Ohio 44512
(330) 783-1135

Appendix A – Opinion And Order Of The Ohio Seventh District Court Of Appeals

CASE NO. 96 CA 191

STATE OF OHIO, MAHONING COUNTY,
IN THE COURT OF APPEALS
SEVENTH DISTRICT

1999 Ohio App. LEXIS 4119

DAVID P. CERVONE,
Plaintiff-Appellant

v.

CHARLES L. BORIS,
Defendant-Appellee

August 27, 1999, Decided
August 27, 1999, Filed

Civil Appeal from Mahoning County Common Pleas Court,
Case No. 95 CV 1541.

JUDGMENT: Affirmed.

JUDGES:
Hon. Joseph J. Vukovich,
Hon. Edward A. Cox,
Hon. Gene Donofrio.

VUKOVICH, J.

Plaintiff-appellant David Cervone appeals from the decision of the Mahoning County Common Pleas Court which granted summary judgment in favor of defendant-appellee Charles Boris. For the following reasons, the trial court's judgment is affirmed.

Appellant and Linda Matteucci divorced in 1983 and agreed that appellant would be the residential parent of their four year old child, Charles Cervone. However, Mrs. Matteucci filed a motion for a change of custody in 1991, after Charles expressed a desire to live with her. Thereafter, appellant spoke to a social worker about certain problems that he perceived Charles was having. This social worker recommended testing and counseling for Charles, his parents and their spouses. All parties eventually agreed to the recommendation and chose a psychiatrist, Dr. William Price, at Specialty Care Psychiatric Services, Inc. to test and counsel them.

At Dr. Price's suggestion, the attorneys of appellant and Mrs. Matteucci wrote a joint letter to Dr. Price in March 1992. This letter outlined the scope of services to be provided as follows:

> "Please be advised that we are writing to you on behalf of each of our respective clients, David Cervone AND Linda Matteucci relevant to the psychological testing which is to be completed by your office. At the present time, the parties are attempting to determine the best interest of the minor child, Charles Cervone, as to the designation of the residential parent. As a result, we are requesting that testing and counseling be done with the minor child, the parents of the minor

> child, and the spouses of the parents of the minor child. At the conclusion of said testing and counseling, we are requesting that a letter be issued to each of our offices indicating, if possible, which residence the child should reside at or in the alternative whether joint parenting would be in the best interest of the child."

After the requested testing was performed, Dr. Price informed appellant that the participants did not require his services as a psychiatrist. He referred the participants to appellee, a licensed independent social worker who counseled clients at Specialty Care. Dr. Price showed the above letter to appellee. Appellee had several separate meetings with Charles, with appellant and his wife, and with Mrs. Matteucci and her husband. While meeting with appellant and his wife, appellee told them that he would not divulge any confidences that were shared during the meetings. In June 1992, appellee discontinued his employment at Specialty Care and began employment at First Medical Psychiatric Counseling Associates, Inc. Charles and his family continued seeing appellee at his new facility.

On August 6, 1992, appellee sent a letter to Judge Leskovyansky of the Domestic Relations Court and sent copies of the letter to the attorneys of appellant and Mrs. Matteucci, respectively. Appellee's letter provided:

> "The purpose of this letter is to advise those parties vitally concerned with the disposition of Charles Cervone's custody. Based on a number of variables including ongoing counseling with Charles, formal assessment and clinical interviews with both respective parents and a psychological evaluation administered by my colleague

> Jack T. Raver, M.Ed., Ohio Licensed Psychologist, it is my considered professional judgment that Charles be allowed to follow his wishes and reside with his natural mother, Mrs. Matteucci. He is, in my opinion, clearly competent to make such a decision.
>
> It is apparent that the adversarial nature of the parental relationship has influenced each parent's perception of the needs of the child. However, based on the relationship of the child with each of his parents, I strongly believe his decision to reside with his mother to be the more nurturing of the two and therefore more consistent with the needs of the child at this time. As in any case of this sort, no totally happy resolution can occur. Charles should be given an in Camera Interview and it is my hope that the child be protected from any emotional backlash which might result from that event."

When appellant discovered that appellee had sent a letter to the court, he argued with appellee and terminated his services. A hearing on the motion to change custody was held on February 2, 1993, at which Mrs. Matteucci called appellee to testify. Appellant asserted social worker-client privilege with regards to appellee's testimony. Hence, the court limited appellee's testimony to cover only what he had learned from Charles and Mrs. Matteucci. Thereafter, Mrs. Matteucci became the residential parent of Charles pursuant to an agreement signed by appellant and incorporated into a court order. Appellant immediately filed suit against appellee.[1]

---

[1] He attempted to add Mrs. Matteucci and her attorney as defendants but the court dismissed them as parties. Appellant appealed the dismissal to this court in case number 94-CA-96. We held that there

Appellant's amended complaint outlines four causes of action: breach of confidentiality and fiduciary duty, breach of contract, misrepresentation, and intentional infliction of emotional distress. In June 1996, appellee moved for summary judgment. The court granted summary judgment for appellee in September. This timely appeal followed.

Appellant sets forth two assignments of error, the first of which alleges:

> "THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT, TO THE PREJUDICE OF PLAINTIFF-APPELLANT."

The assignment of error is divided into four sub-assignments of error, one for each of the causes of actions alleged in the complaint. The first sub-assignment provides:

> "APPELLANT'S CLAIM FOR BREACH OF CONFIDENTIALITY AND FIDUCIARY DUTY IS PREMISED UPON COMMON LAW AND COGNIZABLE UNDER R.C. 2317.02."

Social workers are guided by codes of ethical practice. R.C. 4757.11 and 4757.36 (A) (10). A client's right to confidentiality shall be protected by the social worker. Ohio Adm. Code 4757-5-01. "Confidential information shall only be revealed to others when the clients * * * have given their informed consent * * *." *Id*

---

lacked a final appealable order. Appellant then voluntarily dismissed his complaint with prejudice In July 1995, appellant refiled his lawsuit against appellee

Appellant's cause of action for breach of confidentiality is based upon opinions expressed by appellee in his letter to the Domestic Relations Court and by way of his testimony in front of said court. Appellant's main argument is that a social worker's opinion which is based in part upon a collateral client's revelations is confidential even if the opinion does not divulge confidential information about the collateral client and could have been formulated on the basis, of the primary client's revelations alone.

The letter written by appellee to the court reveals that the primary client, Charles, desires to live with his mother. Appellee opined that Charles is competent to make this decision. There is no indication on the face of the letter that appellee revealed information that was communicated to him by appellant in confidence. Appellant admits that appellee has not divulged the contents of any statements made during their meetings. Nonetheless, appellant points to the deposition testimony of appellee which was taken in preparation for this lawsuit where appellee admitted that personal information revealed by appellant was a variable affecting the opinion set forth in appellee's letter. (Depo. 71).

However, appellee also stated that his knowledge was derived not solely from information revealed by appellant but also from sources independent of any such revelations. Charles was the reason appellee's assistance was sought. Appellee formulated an opinion on the best interests and the competence of Charles as requested by the parents of Charles. If appellant wanted to ensure that appellee could not give an opinion to the court which affected the custody of his son, then he should not have asked Charles, his ex-wife and her spouse to seek counseling from appellee in order to determine the best interests of Charles. Further, he should not have consented to the letter written to Dr. Price, who owned the

clinic for which appellee worked, asking for an opinion on which parent should be the residential parent.

The testimony given by appellee before a referee in the Domestic Relations Court was limited to exclude any opinions based upon discussions with appellant. Thus, appellee was only permitted to testify as to his opinions that were based upon discussions with Mrs. Matteucci and Charles. Appellant complains about the following excerpt in appellee's testimony:

> "Q. My question was, how would he [Charles] do in a shared parenting agreement?
>
> A. I don't think he would do very well at all. And my opinion is that I think the communication system lacks quality from the ex-spouses. You can't have shared parenting, quality shared parenting, if you haven't resolved the issue from the divorce.
>
> Q. Communication? We're talking about the mother and father?
>
> A.From the respective parents.
>
> Q. To each other?
>
> A. Yes." (Partial Tr. 34).

As support for his breach of confidentiality allegation, appellant points to the following portion of appellee's deposition testimony:

> "Q. Do you see your opinion there that you don't think the communication system was favorable between the ex-spouses?
>
> A.Correct.

Q. Okay. Isn't that opinion based at least in part on information that you obtained from Mr. Cervone?

A. The information was based in part on what Charlie shared with me throughout his sessions.

* * *

Q. Did David Cervone talk to you about the extent and nature of his communication with his former spouse?

A. He spoke of difficulties with his former spouse.

Q. Do you remember him even telling you that he just doesn't talk to her?

A. I don't remember that.

Q. But in any event, he did give you information regarding the communication difficulties between the spouses?

A. Yes.

Q. So this would be one example of an opinion that you stated in court that was based at least in part upon information that you got from David Cervone?

A. Correct." (Depo. 85-86).

Appellee admitted that his opinion about the communication between appellant and Mrs. Matteucci was based in part upon information given to him by appellant. However, this information was also given to him by Charles and may have been given to him from Mrs. Matteucci as well. The court instructed appellee that he was permitted to express opinions that were based upon information gained from Mrs. Matteucci and Charles.

Pursuant to R.C. 2317.02(G) (1), a social worker shall not testify concerning a confidential communication received from a client or concerning the social worker's advice to the client. This statute does not disqualify a person's social worker as a witness; it merely disallows testimony concerning confidential communications. Also, a client can expressly consent to the testimony of a social worker, thereby waiving the privilege. R.C. 2317.02(G) (1) (b).

In the case *sub judice,* the social worker-client privilege was waived by Mrs. Matteucci and by Charles. Thus, as the court ruled, appellee was permitted to testify concerning the confidential communications received from Mrs. Matteucci and Charles and concerning his advice to them. Appellant cannot file suit against appellee for following court orders. If appellee had a problem with appellant's testimony because it contained opinions that could have been derived from both privileged and nonprivileged sources, then appellee should have objected to the referee's evidentiary ruling and utilized the appeal process. Instead, appellant consented to the order appointing Mrs. Matteucci as the residential parent. For all of the above reasons, this sub-assignment of error is overruled.

Appellant's second sub-assignment contends:

> "APPELLEE OWED APPELLANT A DUTY TO NOT MAKE PUBLIC ANY OPINIONS BY AGREEMENT, AND THE EVIDENCE SUPPORTS APPELLEE'S BREACH OF SAME TO APPELLANT'S DAMAGE."

Appellee promised appellant that he would keep all revelations confidential. Appellant complains, that appellee reached his contractual duty to keep certain confidences. However, under our above analysis, this argument fails.

Appellant also argues that, at a March 27, 1991 meeting, appellee agreed that any opinion letter about the custody of Charles would be written by Dr. Price. Appellant states that on May 29, 1991, appellee reiterated this understanding by stating that even though he was terminating his association with Dr. Price's clinic and appellant was following appellee to a new clinic, Dr. Price would remain responsible for the opinion letter. In support, appellant submits the affidavits of himself and of his wife who was present at both meetings.

The fact that Dr. Price did not formulate an opinion letter is not the fault of appellee. Additionally, we fail to see how appellee's letter regarding the best interests of Charles, the primary client, constituted breach of duty toward appellant. As aforementioned, appellant asked his ex-wife who had just filed a motion against him in the Domestic Relations Court to come to meetings to determine which parent should be the residential parent. Appellant participated in sending a letter to Dr. Price which asked that his "office" perform psychological testing and counseling and then formulate an opinion on the best interests of Charles. Dr. Price referred the participants to appellee who furnished the counseling and the letter. Appellee's primary client was Charles who desired to live with his mother. The letter served to further the wishes of appellee's primary client. As appellee argues, the cause of action in this case, if one so existed, would lie with Charles since the letter reveals his confidences. This sub-assignment is overruled.

Appellant's third sub-assignment of error provides:

"THE EVIDENCE DEMONSTRATES APPELLEE'S MATERIAL MISREPRESENTATIONS TO APPELLANT."

Appellant sets forth the elements of his third cause of action as follows: making a material representation with knowledge of its falsity or with utter disregard and recklessness as to its falsity, intending to mislead and causing justifiable reliance which results in injury. *Burr v. Board of Cty. Commrs. of Stark Cty.* (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101. Appellant claims that he need not establish fraudulent intent because the doctrine of constructive fraud applies in cases involving a fiduciary relationship. *Cohen v. Estate of Cohen* (1986), 23 Ohio St. 3d 90, 491 N.E.2d 698.

Appellant's brief complains that appellee divulged confidential matters after misrepresenting that all information disclosed by appellant would remain confidential. However, we have previously analyzed this allegation and determined that appellee did not disclose any confidential information received from appellant and that any opinions expressed by appellee were derived from information obtained from Charles and Mrs. Matteucci. Thus, there is no genuine issue of material fact as to the existence of a false representation. Appellee represented that he would not disclose confidences and he fulfilled that representation by not disclosing any confidences. Accordingly, this argument is overruled.

Appellant's fourth sub-assignment of error alleges:

> "GENUINE ISSUES OF MATERIAL FACT ALSO EXIST WITH REGARD TO APPELLANT'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS."

The elements for this cause of action are intentionally or recklessly causing severe emotional distress to another by extreme and outrageous conduct. *Yeager v Local Union 20* (1983), 6 Ohio St. 3d 369, 453 N.E.2d 666. Appellant asserts that whether his emotional distress was severe and whether appellee's conduct was extreme and outrageous are not proper questions to resolve on summary judgment. However, we have held that summary judgment is proper where the trial court determines as a matter of law that the defendant's conduct is not beyond all possible bounds of decency or that the plaintiff failed to allege serious and debilitating mental anguish. *Tarver v. Calex Corp.* (1998), 125 Ohio App. 3d 468, 708 N.E.2d 1041, 1998 WL 74378 *13. Since we held that no confidential information was disclosed by appellee, there exists no behavior which would constitute extreme and outrageous conduct. As such, this sub-assignment of error is overruled.

Appellant's second assignment of error alleges:

> "THE TRIAL COURT ERRED IN FAILING TO THOROUGHLY EXAMINE ALL OF PLAINTIFF-APPELLANT'S CLAIMS AND THE SUPPORTING MATERIALS SUBMITTED BY PLAINTIFF-APPELLANT, TO THE PREJUDICE OF PLAINTIFF-APPELLANT."

Appellant complains that the trial court's judgment entry does not discuss his claims for breach of contract,

misrepresentation, and intentional infliction of emotional distress. The judgment entry states that appellee did not disclose any privileged or confidential information either in his letter to the court or in his testimony in front of the referee. As can be seen from our prior discussion, all of appellant's causes of action revolve around the allegation that appellee divulged confidential information or expressed an opinion derived therefrom.

Appellant posits that summary judgment must be reversed pursuant to *Murphy v Reynoldsburg* (1992), 65 Ohio St. 3d 356, 604 N.E.2d 138, where the Court held that the trial court has a mandatory duty to examine the material submitted under Civ.R. 56(C). However, we fail to see the analogy between *Murphy* and the case *sub judice.* In *Murphy,* the trial court admitted that it did not read the motion for summary judgment, the opposition to summary judgment, or the attachments which included many depositions. *Id.* at 359. Because the court granted summary judgment based solely on oral argument, the Supreme Court of Ohio remanded the case to the trial court. *Id.* In the case at bar, there is no indication that the trial court failed to review all of the material submitted to it. In fact, the judgment entry begins, "From the affidavits, briefs, and other exhibits filed herein ***." Therefore, this assignment or error is without merit.

In conclusion, there exists no conflicting testimonials in this case. The issue was whether, under the facts and circumstances, appellee engaged in breach of confidence, breach of contract, fraud, or intentional infliction of emotional distress by disclosing an opinion held about the best interests of a child in a child custody case. Appellant sought counseling for his son for the purpose. of determining whether he or his ex-wife should be their son's residential parent. Appellant asked his ex-wife and her husband to meet with appellee for the

sake of their child. Appellant was a collateral client while his son was the primary client. By speaking for his primary client and revealing an opinion on his client's best interests, appellee did not disclose confidential information gained from his meetings with appellant. Thus, appellee was entitled to judgment as a matter of law.

For the foregoing reasons, the judgment of the trial court is affirmed.

Cox, P.J., concurs.
Donofrio, J., concurs.

APPROVED:
s/ Joseph J. Vukovich
JOSEPH J. VUKOVICH
Judge

Appendix B – Judgement Entry Of The Mahoning County Court Of Common Pleas

CASE NO. 95 CV 1541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS,

Defendant

Decided and Filed September 18, 1996

JUDGMENT ENTRY

JUDGE: CHARLES J. BANNON

From the affidavits, briefs and other exhibits filed herein, the Court finds that defendant Charles L. Boris did not disclose any privileged or confidential information either in his letter to Judge Leskovyansky concerning the custody issue, or in his before the Domestic Relations Referee.

Further, plaintiff David P. Cervone, in response to a question as to whether defendant Boris "divulged the statements or the content of the statements that you provided him," answered that defendant Boris has never to the best of his knowledge divulged such statements.

As to plaintiff's claim that defendant violated R.C. Section 4757.01, et seq. And the Ohio Administrative Code

Chapter 4757, there is no right of action for such violations even if a violation of the code of ethics was proven.

Defendant Boris' motion for summary judgment is sustained.

Complaint dismissed

s/ Charles J. Bannon
CHARLES J. BANNON
Judge Charles J. Bannon

Appendix C – Ohio Supreme Court Dismissal Entry

CASE NO. 99-1833

THE SUPREME COURT OF OHIO

87, Ohio St.3d 1475; 721 N.E.2d 121

DAVID P. CERVONE,

Appellant

v.

CHARLES L. BORIS,

Appellee

Decided an Filed December 22, 1999

On appeal from the Mahoning County Court of Appeals,
Seventh Appellate District

JUDGMENT ENTRY

THOMAS J. MOYER, Chief Justice

Upon consideration of the jurisdictional memorandum filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS: Docket Fee, $40.00, paid by David P. Cervone (Mahoning County Court of Appeals; No. 96CA191)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Appendix D – Ohio Supreme Court Denial of Motion for Reconsideration

CASE NO. 99-1833

THE SUPREME COURT OF OHIO

88, Ohio St.3d 1417; 723 N.E.2d 121

DAVID P. CERVONE,

Appellant

v.

CHARLES L. BORIS,

Appellee

Decided an Filed February 02, 2000

On appeal from the Mahoning County Court of Appeals,
Seventh Appellate District

JUDGMENT ENTRY

THOMAS J. MOYER, Chief Justice

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 96CA191)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Appendix E – Ohio Supreme Court Rule III

RULE III. DETERMINATION OF JURISDICTION ON CLAIMED APPEALS OF RIGHT AND DISCRETIONARY APPEALS

Section 1. Memorandum in Support of Jurisdiction.

(A) In a claimed appeal of right or a discretionary appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal. See Form E following these rules for a sample memorandum.

(B) A memorandum in support of jurisdiction shall contain all of the following:

(1) Table of contents, which shall include the proposition(s) of law stated in syllabus form as set forth in *Drake v Bucher, Supt.* (1966), 5 Ohio St. 2d 37, at 39;

(2) A thorough explanation of why a substantial constitutional question is involved, why the case is of public or great general interest, or, in a felony case, why leave to appeal should be granted;

(3) A statement of the case and facts;

(4) Each proposition of law supported by a brief and concise argument.

(C) Except in post conviction death penalty cases, a memorandum shall not exceed 15 numbered pages, exclusive of the table of contents.

(D) A copy of the court of appeals opinion and judgment entry being appealed shall be attached to the memoran-

dum. The appellant may also attach any other judgment entries or opinions issued in the case, if relevant to the appeal, and copies of unreported opinions cited in the memorandum. The memorandum shall not include any other attachments.

(E) Except as otherwise provided in S. Ct. Prac. R. II, Section 2(A), if the appellant does not tender a memorandum in support of jurisdiction for timely filing along with the notice of appeal, the Clerk shall refuse to file the notice of appeal.

Section 2. Memorandum in Response

(A) Within 30 days after the Memorandum in support of jurisdiction is filed, the appellee may file a memorandum in response.

(Balance of rule omitted)

Appendix F – Petitioner's First Amended Complaint

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

FIRST AMENDED COMPLAINT

August 28, 1995, Filed

Before: CHARLES J. BANNON, Judge

I. PARTIES

1. Plaintiff, David P. Cervone, is and was at all times material hereto a resident of Youngstown, Mahoning County, Ohio.

2. At all times material hereto, defendant, Charles L. Boris, was a resident of Mahoning County, Ohio, and was a licensed social worker regularly transacting business within Mahoning County, Ohio.

II. CLAIM FOR RELIEF
COUNT ONE: BREACH OF CONFIDENTIALITY AND FIDUCIARY DUTY

3. In or about March of 1992, plaintiff established a fiduciary, social worker-client relationship with the defendant Boris, in Mahoning County, Ohio.

4. Under Ohio Revised Code §§4757.0l, et seq., Ohio Administrative Code Chapter *4757* and the code of ethics and standards promulgated by the National Association of Social Workers, all communications and other exchanges of information between plaintiff and defendant Boris, and opinions related thereto, were privileged and confidential.

5. During the period of approximately March 1992 through September of 1992, plaintiff disclosed privileged and confidential information to defendant Boris in the context of the parties' fiduciary, social worker-client relationship, for the limited purpose of obtaining counseling from the defendant regarding private matters involving plaintiff and his minor son.

6. At no time material hereto did plaintiff waive or relinquish the confidentiality attached to the information disclosed to defendant, nor did plaintiff authorize, permit or direct the defendant to divulge confidential information about the plaintiff, including opinions derived from that information, or the fact of the parties' relationship, to third persons.

7. On or about August 6, 1992, and again on or about February 2, 1993, the defendant Boris negligently, recklessly or intentionally disclosed privileged opinion information about the plaintiff to third persons, without authorization, permission or direction to do so.

8. This wrongful disclosure of privileged and confidential opinion information by the defendant was in violation of the laws, rules, standards and regulations governing defendant's practice as a licensed social worker and was in breach of the defendant's fiduciary duty to maintain the confidentiality and privilege of the information entrusted to him by plaintiff, and any opinions derived therefrom.

9. As a direct result and proximate result of the defendant's negligence, recklessness or intentional misconduct complained of herein, plaintiff has suffered severe emotional distress and embarrassment, and has necessarily incurred fees and expenses for medical care in the approximate sum of $1,000.00; $1,000.00 for incidental legal expenses; and paid defendant Boris approximately $500.00, all to his damage.

COUNT TWO: BREACH OF CONTRACT

10. Plaintiff realleges paragraphs I through 9 of his complaint as if fully rewritten herein.

11. In or about March of 1992, and again, in or about May of 1992, defendant Boris agreed that *any* opinions regarding plaintiff, or relating to the custody of plaintiff's minor son, would be the sole responsibility of Dr. William Price, as per an agreement between plaintiff and his ex-wife Linda Matteucci, and that defendant's function would be to provide counseling and therapy, as required, to plaintiff, plaintiff's wife, plaintiff's minor son, and plaintiff's ex-wife and her spouse.

12. The agreement between plaintiff and defendant contemplated and provided only that defendant would conduct certain interviews incident to his performance of said counseling and did not contemplate whatsoever that defen-

dant would publicize and divulge any opinions, to third persons.

13. Defendant Boris has materially breached the agreement entered into by and between plaintiff and defendant by wrongfully disclosing opinions regarding plaintiff and the custody of plaintiff's minor son, to third persons on or about August 6, 1992.

14. As a direct and proximate result of the defendant's breach, there has been a failure of consideration of services in the amount of money paid or owing to defendant in the approximate sum of $500.00, and plaintiff has incurred incidental and consequential medical and legal losses in the approximate sum of $2,000.00, to plaintiffs damage.

COUNT THREE: MISREPRESENTATION

14. Plaintiff realleges paragraph I through 13 of his complaint as if fully rewritten herein.

15. At all times material hereto, defendant Boris represented to plaintiff that a social worker-client relationship existed between the parties and that all information disclosed in the scope and context of the social worker-client relationship, would remain strictly privileged and confidential, and that any and all opinions contemplated under the agreement referred to in paragraph 11 above, would be the responsibility of Dr. William Price.

16. The aforementioned representation made by Boris was material to plaintiff and induced the plaintiffs reliance that he could freely, openly and thoroughly entrust private, personal and confidential information to the defendant.

17. Said representation knowingly made by defendant

Boris, was false and was intended to and did in fact induce reliance on the part of the plaintiff.

18. Plaintiff reasonably relied upon the defendant's representation to his detriment and injury inasmuch as defendant Boris thereafter negligently, recklessly or intentionally disclosed opinions about the plaintiff, and/or relating to custody matters involving plaintiff, to third persons without the authority, permission or direction to so.

19. As a direct and proximate result of the defendant's wrongful conduct complained of herein, plaintiff has suffered severe emotional distress and mental anguish, together with concomitant adverse physical health effects, humiliation, embarrassment and anxiety, and has necessarily incurred fees and expenses for medical care in the approximate sum of $1,000.00; incurred approximately $1,000.00 incidental legal expenses; and paid approximately $500.00 to defendant Boris, all to his damage.

COUNT FOUR: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

20. Plaintiff realleges paragraphs 1 through 19 of his complaint as if fully rewritten herein.

21. Defendant's wrongful disclosure and dissemination of opinions concerning the plaintiff was under circumstances and in a manner demonstrating defendant's intent or reckless disregard for the plaintiff's rights.

22. Defendant Boris either intended to cause or knew or should have known that his disclosure of opinions concerning plaintiff would result in psychic injury in the form of plaintiff's suffering of severe emotional distress.

23. As a direct and proximate result of the defendant's outrageous conduct complained of herein, the plaintiff has suffered severe emotional distress and anguish, together with concomitant adverse physical health effects, humiliation, depression, anxiety and embarrassment, and has necessarily incurred fees and expenses for medical care in the sum of $1,000.00; 1,000.00 incidental legal expenses; and paid approximately $500.00 to defendant Boris, all to his damage.

WHEREFORE, plaintiff. David P. Cervone, hereby demands judgment pursuant to his claims against defendant, Charles L. Boris, for the sum of Two Thousand Five Hundred Dollars ($2,500.00) special and consequential damages, and compensatory and punitive damages in excess of Twenty-Five Thousand Dollars *($25,000.00),* together with an order restraining and enjoining the defendant from further releasing, disclosing or disseminating any confidential information or opinions about plaintiff and directing and requiring defendant to deliver to plaintiff all original and copies of notes, memorandum and letters in his possession or control relating to the plaintiff, together with attorney's fees and costs in the within action.

Respectfully submitted,

s/ Gary J. Philibin
GARY J. PHILIBIN
Counsel for Plaintiff

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable in the within action.

s/ Gary J. Philibin

Appendix G – Affidavit of David P. Cervone

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

AFFIDAVIT OF DAVID P. CERVONE

Dated September 5, 1996

Before: CHARLES J. BANNON, Judge

David P. Cervone, after first being duly cautioned and sworn, upon personal knowledge and information deposes and states:

1. I am the Plaintiff in the above entitled action.

2. I was a patient of, and received therapy from, Charles L Boris, a Licensed Independent Social Worker, from March 27, 1991 until approximately August of 1991 as indicated in the partial billing records attached hereto as Exhibit A.

3. On March 27, 1991, Mr. Boris stated, in the presence of my wife Joyce, that we had been referred to him by Dr. William Price for the purpose of receiving therapy and

counseling. Mr. Boris further stated that he had reviewed the March 13, 1991 letter attached as Exhibit B, from Matthew C. Giannini and John F. Shultz to Dr. William Price, and that any future letter and/or opinions concerning the custody of my son Charles contemplated in said letter, would be the sole responsibility of Dr. Price.

4. On April 3, 1991, again in the presence of my wife Joyce, Mr. Boris confirmed, in response to a direct question from me, that a social-worker/client relationship existed between both Joyce and myself, and himself, and that any communications between us would be privileged and confidential and would not, and/or could not, be disclosed to anyone, under any circumstances.

5. On May 29,1991 Mr. Boris explained, again in the presence of my wife Joyce, that he was starting a new practice, and recommended that Joyce and I continue seeing him at his new location rather than starting over with a new therapist. Mr. Boris further stated that if we chose to continue counseling with him, Dr. Price would continue to be responsible for any letter and/or opinions referred to paragraph 3 above.

6. At no time did I ever, either directly or indirectly, authorize, request, or direct Mr. Boris to send any letter, to the Court of Domestic Relations, or any other entity or individual.

7. At no time did I ever, either directly or indirectly, express consent for Mr. Boris to make public, in any written or verbal form, any opinions based wholly, or in part, on any confidential information shared with him as part of the counseling referred to in paragraph 2 above.

8. The letter sent by Mr. Boris to the Court of Domestic Relations on August 6, 1991, was sent without my knowledge or consent, and resulted in additional legal fees being incurred in the matter of David P. Cervone vs. Elizabeth M. Cervone, nka Matteucci, (Case No. 82-DR-108 1), and medical expenses being incurred by myself, due to severe emotional distress, humiliation, and depression I sustained. The unauthorized opinions stated by the defendant effected my relationship with my son Charles, causing additional severe emotional distress.

9. With respect to the testing and counseling, which was the subject of Exhibit B attached, the suggestion that all parties (myself and my ex-wife, our son Charles, and our current spouses) be evaluated and participate in counseling, was first proposed by me in a meeting on October 9, 1991 between myself, my ex-wife, and our respective attorneys John Shultz and Matthew Giannini, and was based on the recommendation, made previously and later confirmed in Exhibit C, of Mary Stewart, a Licensed Psychologist. This proposal was finally agreed to by my ex-wife on February 22, 1992 (see Exhibits D& E attached).

10. Other than the agreement between myself and my ex-wife to participate in the testing and counseling referred to above, no agreement existed that bound either of us, in any manner, to any opinion which Dr. Price might have expressed as a result of the letter attached hereto as Exhibit B, or which contemplated Dr. Price being utilized as an expert witness in any litigation.

11. As a result of the defendant's actions, I sustained monetary damages in the approximate amount of $2,500.00 and was forced to seek professional counseling, and take medication, which I did not want to take, for depression and

disturbed sleep, conditions which periodically persist to this day.

Further affiant sayeth naugth

s/ David P. Cervone
DAVID P. CERVONE

Sworn to before me and subscribed in my presence this 5th day of September, 1996.

s/ Cynthia A. Byrne
CYNTHIA A. BYRNE
Notary Public

(Exhibits omitted)

Appendix H – Affidavit of Joyce G. Cervone

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

AFFIDAVIT OF JOYCE G. CERVONE

Dated September 4, 1996

Before: CHARLES J. BANNON, Judge

Joyce G. Cervone, after first being duly cautioned and sworn, upon personal knowledge and information deposes and states:

1. I am not a party in the above entitled action.

2. On March 27, 1991, Charles L. Boris, a Licensed Social Worker, stated in my presence, that my husband David and I had been referred to him by Dr. William Price for the purpose of receiving therapy and counseling. Mr. Boris further stated that he had reviewed the March 13, 1991 letter attached as Exhibit A, from Matthew C. Giannini and John F. Shultz to Dr. William Price, and that any future letter and/or

opinions concerning the custody of my stepson Charles contemplated in said letter, would be the sole responsibility of Dr. Price.

3. On April 3, 1991, again in the my presence, Mr. Boris confirmed, in response to a direct question from my husband, that a social-worker/client relationship existed between both David and myself, and himself, and that any communications between us would be privileged and confidential and would not, and/or could not, be disclosed to anyone, under any circumstances.

4. On May 29,1991, again in my presence, Mr. Boris explained that he was starting a new practice, and recommended that David and I continue seeing him at his new location rather than starting over with a new therapist. Mr. Boris further stated that if we chose to continue counseling with him, Dr. Price would continue to be responsible for any future letter and/or opinion referred to in paragraph 3 above.

Further affiant sayeth naught.

s/ Joyce G. Cervone
JOYCE G. CERVONE

Sworn to before me and subscribed in my presence this 4th day of September,

s/ Cynthia A. Byrne
CYNTHIA A. BYRNE
Notary Public

(Exhibits omitted)

Appendix I – Affidavit of Attorney John F. Shultz

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

AFFIDAVIT OF JOHN F. SHULTZ

Dated September 4, 1996

Before: CHARLES J. BANNON, Judge

John F. Shultz, after first being duly cautioned and sworn, upon personal knowledge and information deposes and states:

1. I am a licensed Attorney in the State of Ohio.

2. I was the legal representative of David P. Cervone in the matter of David P. Cervone vs. Elizabeth M. Cervone, nka Matteucci (Case No. 82- DR-108 1), from approximately June of 1991, to August 5, 1992.

3. The agreement between David P. Cervone and Elizabeth Matteucci to have their son Charles, themselves, and their spouses, evaluated and counseled, provided that Dr. William Price would be responsible for said evaluation,

counseling, and any letter expressing opinion directed to Matthew C. Giannini and myself, all as referred to in Exhibit A attached.

4. I never authorized, requested, or directed Charles L. Boris to send any letter, or express any opinion, anticipated under the aforementioned agreement, to either myself, the Court of Domestic Relations, or any other individual, or entity.

5. I have no recollection of any agreement between David Cervone and Linda Matteucci to be bound by, in any manner, any opinion expressed by Dr. Price, nor do I recall indicating, to any individual, that such an agreement existed.

Further affiant sayeth naught.

s/ John F. Shultz
JOHN F. SHULTZ

Sworn to before me and subscribed in my presence this 4th day of September, 1996

s/ Michele A. Salvino-Smith
MICHELE A. SALVINO-SMITH
Notary Public

(Exhibits omitted)

Appendix J – Affidavit of Martin S. Delahunty, III

CASE NO. 95 CV 01541

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

DAVID P. CERVONE,

Plaintiff

v.

CHARLES L. BORIS

Defendant

AFFIDAVIT OF MARTIN S. DELAHUNTY, III

Dated September 3, 1996

Before: CHARLES J. BANNON, Judge

Martin S. Delahunty, Ill, after first being duly cautioned and sworn, upon personal knowledge and information deposes and states

1. I am a licensed Attorney in the State of Ohio.

2. I was the legal representative of David P. Cervone in the matter of David P. Cervone vs. Elizabeth M. Cervone, nka Matteucci (Case No. 82-DR-1081), from approximately July of 1992, to September of 1993.

3. I never authorized, requested, or directed Charles L. Boris to send any letter, or express any opinion, to either myself, the Court of Domestic Relations, or any other individual, or entity.

4. The letter dated August 6, 1992, which Mr. Boris sent to Judge John J. Leskovyansky, was the direct cause of additional legal fees being incurred by Mr. Cervone.

Further affliant sayeth naught.

s/ Martin S. Delahunty, III
MARTIN S. DELAHUNTY, III

Sworn to before me and subscribed in my presence this 3rd day of September, 1996

s/ Elaine G. Mosbrook
ELAINE G. MOSBROOK
Notary Public

(Exhibits omitted)